IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

v.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

Peter L. Briger, Esq.
BRIGER & ASSOCIATES
299 Park Avenue
New York, New York 10017
(212) 758-4000

Sheldon S. Cohen, Esq.,
COHEN & URETZ
1775 K Street, N.W.
Washington, D.C. 20006
(202) 293-4740

Reed M. Williams, Esq.,
Ronald L. Young, Esq.,
GRAHAM & JAMES
100 Oceangate, Suite 515
Long Beach, Calif. 90802
(213) 435-4435

Counsel for Appellants

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JURISDICTIONAL STATEMENT

Appellants appeal from the decision of the Supreme Court of the State of California (hereinafter referred to as the "California Supreme Court") filed on November 18, 1977, rehearing denied on December 28, 1977, which affirmed the decision of the Court of Appeal, Second Appellate District, of the State of California (hereinafter referred to as the "Court of Appeal"), which upheld the right of Appellees to impose personal property taxes upon ocean-going containers, owned by foreign persons, used exclusively in foreign commerce and having no fixed presence in the territorial limits of Appellees. The decision of the Court of Appeal reversed the decision of the Superior Court, County

of Los Angeles (hereinafter referred to as the "Superior Court"), which held that the imposition of such tax was in violation of the Constitution of the United States (hereinafter referred to as the "Constitution") and various treaty obligations of the United States. Appellants submit this Statement to show that this Court has jurisdiction of the appeal and that substantial Federal questions are presented requiring plenary consideration, with briefs on the merits and oral argument for their resolution.

Opinions Below

The opinion of the California Supreme Court is reported at 20 Cal.3d 180, 141 Cal.Rptr. 905, 571 P.2d 254 (1977). The opinion of the Court of Appeal is reported at 61 Cal. App.3d 562, 132 Cal.Rptr. 531 (1976). The opinion of the Superior Court was not officially reported. Copies of these Opinions, Findings of Fact and Conclusions of Law and Judgment are attached hereto as Appendix A.

Jurisdiction

This suit was brought as a civil action against Appellees for the recovery of personal property taxes paid with respect to ocean-going containers, owned by Appellants (six Japanese corporations), used exclusively in foreign commerce and having no fixed presence within the territorial limits of Appellees. The basis of the suit was that the imposition of such taxes violates the Constitution and various treaty obligations of the United States.

The judgment of the California Supreme Court was entered on December 28, 1977, at the time it denied Appellants' petition for rehearing. The Notice of Appeal was filed in that Court on February 24, 1978 and a copy is at-

tached hereto as Appendix B. The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). Decisions sustaining jurisdiction of this Court to review the decision on direct appeal are: *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 61, n.3 (1963); and *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).

If this Court does not consider this appeal to be the proper mode of review, Appellants request that this appeal be acted upon as a petition for a writ of *certiorari* pursuant to Title 28, United States Code, Section 2103.

Statutes Involved

California Revenue and Taxation Code, Section 201,* provides as follows:

> "All property in this State, *not exempt under the laws of the United States* or of this State, is subject to taxation under this code."
>
> 59 West's Annotated California Codes 215 (1970). (Emphasis Added.)

The relevant provisions of the Constitution and treaty obligations of the United States are: Article I, Section 10, Cl. 2, Cl. 3; Article I, Section 8, Cl. 3; Article VI, Cl. 2; Article II, Section 2, Cl. 2; and the Fourteenth Amendment, Section 1 of the Constitution; Chapter I, Article 1(a) and Chapter II, Article 2 of the Customs Convention on Containers (hereinafter referred to as the "Container Convention"), 20 U.S.T. 301, T.I.A.S. 6634; Article XI(1) and (4) and Article XXII(2) of the Treaty of Friendship, Com-

* Unless otherwise indicated hereinafter, all statutory section references are to the California Revenue and Taxation Code.

merce and Navigation between the United States and Japan (hereinafter referred to as the "FCN Treaty with Japan") 4 U.S.T. 2063, T.I.A.S. 2863; and Article III, paragraphs 1 and 2 of the General Agreement on Tariffs and Trade (hereinafter referred to as the "GATT") 61 Stat. [5], [6], T.I.A.S. 1700. An additional statutory provision is Section 205, Title 18, California Administrative Code. The pertinent text of the above cited provisions are attached hereto as Appendix C.

Question Presented

The question presented is whether the interpretation by the California Supreme Court of Section 201 to permit the imposition of personal property taxes on foreign-owned, ocean-going containers, used exclusively in foreign commerce, present within the territorial limits of Appellees for only limited periods of time and continually in transit, is in violation of Article I, Section 10, Clause 2 and Clause 3 (the Import-Export and Prohibition against Tonnage Duties Clauses), Article I, Section 8, Clause 3 (the Commerce Clause), Article VI, Clause 2 (the Supremacy Clause) and Article II, Section 2, Clause 2 (the Treaty Power) of the Constitution and of Chapter I, Article 1(a) and Chapter II, Article 2 of the Container Convention, Articles XI(1) and (4) and Article XXII(2) of the FCN Treaty with Japan and Article III, paragraphs 1 and 2 of the GATT. Moreover, although not specifically raised and argued below, there is implicit in the facts of this case the question whether Section 201, as interpreted by the California Supreme Court, is in violation of the Fourteenth Amendment of the Constitution (the Due Process Clause).

Statement

Appellants are six corporations established and existing under the laws of Japan. They are, *inter alia,* engaged in the ocean transport of cargo between Japan and the United States, as well as third countries. Each of the Appellants maintains its principal place of business and commercial domicile in Japan. Commencing in the late 1960's, Appellants began to transport cargo between Japan and the United States by means of ocean-going containers, carried upon their vessels specially designed and constructed to carry such containers. The utilization of containers is a recent and significant technological advance in the ocean transportation of cargo. Aside from reducing the actual cost of transportation through greater efficiency, the use of such containers significantly reduces the risk of damage through theft or fire, thereby significantly reducing the need for fire and police protection. All of the vessels of Appellants, on which the subject containers are carried, are registered and maintain their "home port" in Japan.

During the tax years 1970, 1971 and 1972,* Appellants utilized ports within the territorial limits of Appellees in connection with their containerized transport of cargo in foreign commerce. Appellants did not maintain on a permanent basis any particular containers within the territorial limits of Appellees during the periods in issue. In fact, none of the containers present in the territorial limits of Appellees on the relevant tax lien dates had been present therein for as much as three of the twelve months immediately preceding the aforesaid lien dates. The average stay of any of the containers therein at any one time was less

* Under California law, a property tax year commences on the first day of July of each year. However, the tax is applicable to all property within the taxing jurisdiction on the preceding first day of March, which is commonly referred to as the "lien date."

than three weeks. The containers of Appellants were present within the territorial limits of Appellees as an integral part of the foreign transport of cargo and were used exclusively in foreign commerce. The containers were never used for the intrastate or interstate transportation of cargo, except as continuations of foreign voyages. Each container subjected to tax by Appellees was in constant transit in foreign commerce, except for transitory periods awaiting the loading of cargo or repairs.

Pursuant to an "average presence" formula, not authorized by Section 201 or any other provision of law, and contrary to another express provision relating to the taxable *situs* of moveable property,* Appellees treated Appellants as though they had actually maintained a certain fixed number of containers upon a permanent basis within the territorial limits of Appellees on the lien dates in issue.

A review of the published reports relating to revenues (including tax collections) and expenditures of Appellees during the years in issue indicates that less than two to three percent of the total revenues of Appellees could in any way be considered as providing any potential measure of support, benefit or protection to the Appellants herein in terms of police protection and fire protection, road construction and maintenance.** The record is silent regarding the extent to which Appellants derive any benefit from Appellees' expenditures for police and fire protection and road construction and maintenance, a tacit recognition by Appellees that the benefit to Appellants therefrom is minimal.

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* Title 18, California Administrative Code, Section 205.

** There are attached hereto as Appendix D copies of the relevant portions of such reports and an analysis thereof to support this conclusion. It is submitted that the Court can take judicial notice thereof. *See*, *N.L.R.B.* v. *E. C. Atkins & Co.*, 331 U.S. 398, 406, fn. 2 (1946).

All containers of Appellants (including those subjected to property taxation upon an apportionment basis by Appellees) have been subjected to full *ad valorem* property taxation in Japan. Appellants timely paid such taxes and no portion thereof has been refunded. At all times relevant hereto, containers, owned or used by United States shipping companies, were never subjected to property tax in Japan, even though temporarily present in Japan for the receipt or delivery of cargo or awaiting transport by vessel. To eliminate the incidence of multiple taxation upon vessels (including containers used in connection therewith), which operate in foreign commerce, Japan applies the equivalent of a "home port" doctrine.

All other governments with which the United States maintains trading relationships have taken steps, through a variety of means, to assure that foreign-owned containers, used exclusively in foreign commerce and present in the foreign country only for temporary periods of time are exempt from local property taxation. Some countries, such as Japan, impose property taxes upon the equivalent of a "home port" doctrine. Other countries exempt foreign-owned containers, provided that they are present therein for only some limited period during the year. Other countries either totally exempt containers from taxation or do not impose such taxes. The Federal Republic of Germany provides an exemption for local property taxes in the case of foreign-owned containers, provided that the foreign country in which the owner is a national, resident or domiciliary provides a reciprocal exemption.

By letter dated December 19, 1977, the Office of the Special Trade Representative, which is a part of the Executive Office of the United States established to assume the responsibility for the international trade relations of the United States, advised Appellants that it was substantially in agreement with the position of the Appellants and

that it considered the imposition of property taxes by Appellees, in the instant circumstances, a non-tariff trade barrier of the type it is attempting to convince the foreign trading partners of the United States to eliminate. A copy of this letter is attached hereto as Appendix E.

On February 17, 1978, representatives of the Government of Japan conferred with the United States Department of State (hereinafter referred to as the "State Department") to express concern over the imposition by Appellees of property taxes upon the containers of Appellants. A formal letter confirming the concern expressed at that meeting was delivered by the Government of Japan to the State Department on March 27, 1978. A copy of this letter is attached hereto as Appendix F.

How the Federal Questions Were Raised and Decided Below

Appellants, both on brief and oral argument before the Superior Court, contended that the property tax levied by Appellees was invalid on the following grounds: (i) the Commerce Clause (Article 1, Section 8, Cl. 3) of the Constitution, including the "home port" doctrine; (ii) the Import-Export Clause (Article 1, Section 10, Cl. 2) of the Constitution; and (iii) the FCN Treaty with Japan and the provisions of the GATT. Because Appellants considered that the invalidity of such tax was governed by the decision of the California Supreme Court in *Scandinavian Airlines System* v. *County of Los Angeles*, 56 Cal.2d 11, 14 Cal.Rptr. 25, 363 P.2d 56 (1961), it was not considered necessary at that time to raise and argue all of the other Federal grounds upon which the imposition of the tax should be considered invalid.

The Superior Court rendered judgment in favor of the Appellants concluding that the tax was invalid under the Commerce Clause because: (i) the containers were instrumentalities of foreign commerce that entered the United States only for purposes of engaging in foreign commerce; (ii) the "home port" doctrine was applicable; and (iii) foreign commerce is a matter of exclusive Federal concern. In addition, the Superior Court concluded that taxation of the subject containers by the Appellees violates the terms of Article XI of the FCN Treaty with Japan and the "most-favored-nation" provisions in the FCN Treaty was applicable to prohibit the imposition of tax by Appellees.

Appellants raised the same arguments before the Court of Appeal, both in brief and oral argument, and further contended in oral argument that the tax constituted a duty of tonnage, prohibited by Article 1, Section 10, Clause 3 of the Constitution.

The Court of Appeal reversed the decision of the Superior Court, concluding that: (i) double taxation of instrumentalities used in foreign commerce is not contrary to the Commerce Clause of the Constitution; (ii) the "home port" doctrine does not have continued vitality; (iii) the property tax is not a prohibited tonnage duty; (iv) the Import-Export Clause is inapplicable to the subject containers; and (v) the FCN Treaty was not applicable.

The Appellants presented the same arguments to the California Supreme Court, which adopted almost *verbatim* the decision and reasoning of the Court of Appeal.

The Federal Questions Are Substantial

The issues involved in this appeal are in certain respects similar to those raised in *Norfolk & Western Ry. Co.* v. *Missouri State Tax Commission*, 390 U.S. 317 (1968); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959); *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization and Assessment*, 347 U.S. 590

(1954); *Standard Oil Co.* v. *Peck*, 342 U.S. 382 (1952); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 64 (1946); *and Standard Oil Company of California* v. *Johnson*, 316 U.S. 481 (1942), which were considered and reviewed by the Court pursuant to the appeal rather than *certiorari* process. The issues presented herein are of importance to: (i) virtually all international carriers, including not only steamship companies but also airlines, foreign and domestic (because of the possibility of retaliation); (ii) the shippers which utilize the services of such carriers and consumers since such property taxes are likely to be passed on in the form of increased freight charges or price increases; and (iii) state and local governments which may seek to tax such carriers or to impose a charge calculated to take into acount the specific services, benefits or protection provided.

The issues involved are of importance for a number of reasons. The decision of the California Supreme Court would, for the first time, extend the right of local governments to impose a tax upon objects or instrumentalities used directly and exclusively in foreign commerce, owned by foreign persons, having no fixed presence in the territorial limits of Appellees and continually in transit as part of a foreign voyage. While the taxes have been levied under the guise of an apportioned property tax, in substance the real jurisdictional basis of the tax is the entry of the containers into the territorial limits of Appellees. The imposition of such a tax upon the containers of Appellants will result in the incidence of double taxation in that the containers, already subject to full *ad valorem* property taxation in Japan, are then subjected to an "apportioned" *ad valorem* property tax by the Appellees. On the other hand, because Japan has traditionally utilized the equivalent of a "home port" doctrine, U.S.-owned containers, used in the transportation of cargo to Japan, are subjected to

only one measure of property taxation, namely that imposed by the various States of the United States, where a fair system of apportioned taxation can be assured because of the jurisdiction of this Court.

It is submitted that the imposition of such taxes upon Appellants' containers also violates various treaty obligations of the United States, as discussed below. The Government of Japan has expressed its concern regarding this issue to the State Department. It is understood that, if property taxes are levied upon German-owned containers by local governments of the State of California, the Ministry of Finance has advised that U.S.-owned containers will be subjected to property taxation in the Federal Republic of Germany, despite the existence of a treaty providing to the contrary. It is understood that a number of other foreign governments, including the Federal Republic of Germany, intend to express their concern regarding this issue to the State Department. Due to: (i) the significant departure from established international practice which this action by Appellees (as sanctioned by the California Supreme Court) has produced for the United States; (ii) the abrogation, as perceived by the foreign treaty partners of the United States, of international treaty obligations regarded as precluding such taxes; and (iii) the adverse and discriminatory impact upon the transportation of goods by foreign trading and treaty partners of the United States (including not only Japan but also other nations), the decision of the California Supreme Court is likely to have serious adverse effects upon the foreign relations of the United States.

The management of United States foreign policy and foreign relations is a power which has been withheld from the states and is lodged exclusively with the Federal government. Uniformity and, hence exclusivity, of Federal regulation, as it relates to the containers of Appellants, is

particularly justified since the subject property tax has the realistic potential for substantially disrupting the foreign relations of the United States.

Although not specifically argued below, it would further appear that the level of property taxes imposed upon the containers of Appellants is totally disproportionate to the level of support, benefits or protection afforded to the containers of Appellants.

Finally, the California Supreme Court has incorrectly perceived the Constitutional limitations upon the authority of Appellees to impose taxes upon the containers of Appellants. In this respect, it has misconstrued a number of decisions of this Court and has acted contrary to various treaty obligations of the United States. In permitting the imposition of such taxes, the decision of the California Supreme Court is in direct conflict with the various provisions of the Constitution and treaty obligations of the United States, as noted in the following discussion.

1. Import-Export and Prohibition Against Tonnage Duties Clauses

The Import-Export Clause was designed to "prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State." *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 290 (1976). As noted in *Brown* v. *Maryland*, 25 U.S. (12 Wheat) 419, 439 (1827) and in *Michelin*, 423 U.S. at 285, this prohibition has a threefold purpose, namely, to avoid friction between the various states, to prevent impairment of commercial relations with foreign nations and to confer a source of revenue upon the Federal government. The prohibition against tonnage duties is a companion provision intended to prevent indirect taxation by state or local governments of goods still involved in the import-export process,

through the device or subterfuge of taxing the instrumentalities carrying the goods still involved in the import-export process.

While purporting to rely upon the decision of this Court in the *Michelin* case, the decision of the California Supreme Court is contrary to, and in direct violation of, the basic rule enunciated in *Michelin*. This Court, in *Michelin*, specifically concluded that the imposition of property taxes by a local government did not violate the Import-Export Clause because the goods subjected to taxation were *no longer in transit* but had come to rest within the jurisdiction of the local taxing authority. In particular, the Court specifically stated that the goods carried in containers, and by implication the containers themselves, could not, by virtue of the Import-Export Clause, be subjected to local property taxation. To this effect, the Court stated as follows:

> "Finally, nondiscriminatory ad valorem property taxes do not interfere with the free flow of imported goods among the States, as did the exactions by States under the Articles of Confederation directed solely at imported goods. *Indeed, importers of goods destined for inland states can easily avoid even those taxes in today's world. Modern transportation methods such as air freight and containerized packaging, and the development of railroads and the Nation's internal waterways, enable importation directly into the inland states.*
>
> . . . An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enable them to single out goods destined for other States. In effect, the Clause was fashioned to prevent the imposition of exactions which

were no more than transit fees on the privilege of moving through a State. A nondiscriminatory ad valorem property tax obviously stands on a different footing, *and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.*" 423 U.S. at 288-290. (Emphasis added.)

The specific limitation by this Court of its holding in *Michelin*, excluding from its scope a tax levied on goods while transported in containers, and by implication the containers themselves, in the import-export process, reaffirms the long-standing posture of this Court that such a tax would be one "so directly and closely related" to the process of importing and exporting that it would in substance be a tax upon importation and exportation itself. *Almy* v. *California*, 65 U.S. (24 How.) 169 (1861); *Thames and Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19, 25 (1915); and *Brown* v. *Maryland*.

The reliance of the California Supreme Court upon *Michelin* was incorrect for two additional reasons. First, while the non-discriminatory nature of a tax imposed on goods in interstate commerce establishes its validity under the Commerce Clause (*see, e.g., Nippert* v. *Richmond*, 327 U.S. 416 (1946)), such is not determinative of the validity of a tax under either the Import-Export Clause or the Prohibition Against Tonnage Duties Clause. *Fairbanks* v. *United States*, 181 U.S. 283, 292 (1901); and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946). The test of the validity of a tax on goods or of a duty on tonnage is whether the goods or instrumentalities involved are still *in the import or export process* at the time of the assessment. Such is the test which the Court prescribed

in *Kosydar* v. *National Cash Register*, 417 U.S. 62, 69 (1974), for the purpose of determining the validity of property taxes on exports. Moreover, as noted above, the Court, in *Michelin*, based its conclusion on the fact that the goods involved therein were no longer in transit in connection with the import process.

The taxes in this case have been levied upon foreign-owned containers constantly and exclusively engaged in the carriage of goods in foreign commerce. In addition, such taxes are, in essence, based upon the mere fact of entry into, and transitory presence within, the territorial limits of Appellees. Under Section 201, the jurisdictional basis for taxation is all property *"in this State"*, which term is defined in Section 130(f) to mean "within the exterior limits of the State of California." Thus, the property taxes in question attach the moment Appellants' containers enter the State of California.* Such a tax is precisely what this Court concluded that the framers of the Constitution intended to proscribe by the Import-Export Clause and the Prohibition against Tonnage Duties Clause. *Cox* v. *Lott*, 79 U.S. (12 Wall.) 204 (1871); *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261 (1935); and *Michelin, supra*. The property taxes levied by Appellees are, in effect, tonnage duties, which have been defined as a general tax attaching when an instrumentality of commerce enters the taxing jurisdiction and without regard to the extent of service or benefit, if any, actually rendered to it by the taxing jurisdiction. *Inman Steamship Co.* v. *Tinker*, 94 U.S. (4 Otto.) 237 (1876); and *Cannon* v. *New Orleans*, 87 U.S. (20 Wall.) 577 (1874).

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* Such would result, for example, in the taxation of containers aboard a vessel passing through California waters on the lien date on a voyage from Panama to Canada, notwithstanding the fact that such containers were never landed within the state.

Moreover, the decision of the California Supreme Court has failed to consider the following admonition of this Court that a prohibition "... upon the States against levying duties on imports or exports would be ineffectual if it did not also extend to duties on the ships which serve as the vehicles of conveyance, which was doubtlessly, intended by the prohibition of any duty of tonnage." *Cox* v. *Lott*, 79 U.S. (12 Wall.) at 218. The containers involved in the instant proceeding are both instrumentalities of commerce in their own right, as well as constituting an integral part of the vessels which transport them. Consequently, on either basis they are embraced within the Constitutional prohibition against a "duty of tonnage."

While the expression "duty of tonnage" in the literal sense refers to a tax on vessels according to their tonnage, this Court has extended the definition of tonnage duties to "... embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines* v. *Alabama*, 296 U.S. at 265-266. *See, also, Steamship Co.* v. *Port Warden*, 73 U.S. (6 Wall.) 31 (1867).

The ocean going containers involved in this case constitute a significant technological advance in the ocean transport of cargo. The manner in which the containers and the vessels that carry them have been designed and constructed makes it clear that the containers are an integral part of the vessels. To exclude containers from the protection against tonnage duties would clearly discriminate against containers as compared to historical instrumentalities of foreign commerce in a manner contrary to the admonition of Justice Frankfurter in *Northwest Airlines* v. *Minnesota*, 322 U.S. 292, 300 (1943), when he cautioned against the

fixing of rules which did not permit continuing technological developments to be taken into account.

2. The Commerce Clause

By definition, an instrumentality used in interstate and, in particular, foreign commerce moves through more than one political jurisdiction. The Commerce Clause was incorporated into the Constitution to eliminate unnecessary and insupportable burdens on interstate and, in particular, foreign commerce, emanating from undue state and local regulation. One of the particular burdens which the framers of the Constitution sought to eliminate through the Commerce Clause was the incidence of double or multiple taxation. *See*, 5 *The Debates in the Several State Conventions on the Addition of the Federal Constitution* 112 (2d ed. Eliott 1876) (Madison). The framers of the Constitution recognized that the only way to eliminate this divisive situation was by a uniform system of regulation by the Federal government. Accordingly, the Commerce Clause of the Constitution was drafted to provide that Congress shall have the power to regulate interstate and foreign commerce. Although the Constitution left open the question of what power the states would retain regarding the regulation of the instrumentalities of interstate and foreign commerce, it is submitted that, within the context of this particular question and its potential for adverse international consequences for the United States, it must be considered one exclusively of Federal concern. This is indicated not only by the various treaty obligations (particularly the Container Convention) entered into by the Federal Government but also by the ratification by the United States Senate.

Foreign commerce constitutes one aspect of our foreign relations and, as such, has been determined by this Court

to demand uniformity of regulation possible only through exclusive regulation by the Federal Government. *Brown* v. *Maryland,* 25 U.S. (12 Wheat.) at 445-449. *See also, Philadelphia & Southern Mail Steamship Co.* v. *Pennsylvania,* 122 U.S. 326 (1887); *Gloucester Ferry Co.* v. *Commonwealth of Pennsylvania,* 114 U.S. 196, 204-206 (1885); *and Philadelphia & Reading Railroad Co.* v. *Pennsylvania,* 82 U.S. (15 Wall.) 232 (1873).

The exclusive power to regulate foreign affairs enables the Federal Government not only to deal with foreign nations through affirmative acts such as establishing diplomatic relations, but also to:

> ". . . be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interest."
>
> *Perez* v. *Brownell,* 356 U.S. 44, 57 (1958).

As in the case of other constitutional provisions which on their face do not allow for exception, this Court has approached Commerce Clause questions in a manner which requires a weighing of the various interests involved. In the context of taxation, this Court has permitted imposition of reasonable taxes upon interstate commerce where the burden upon commerce and the impact of double taxation could be limited through application of an apportionment principle. However, with regard to the rights of states to tax foreign commerce, where there can be no reasonable assurance of proper apportionment, it is submitted that, in the instant circumstances, the application of the "home port" doctrine, as enunciated by this Court in *Hays* v. *The Pacific Mail Steamship Co.,* 58 U.S. (17 How.) 596 (1855), remains the most appropriate means to deal with this particular question. This conclusion prevails even though this Court has approved an apportioned property tax in the case

of somewhat comparable property. *See, Braniff Airways, Inc.* v. *Nebraska Board of Equalization and Assessment,* 347 U.S. 590 (1953); *Ott* v. *Mississippi Barge Line,* 336 U.S. 169 (1949); and *Standard Oil Co.* v. *Peck,* 342 U.S. 382 (1951). These cases do not govern the instant case because: (i) the property involved therein was used exclusively in interstate commerce and owned by United States persons; and (ii) this Court has never sanctioned the application of an apportioned property tax to an object or instrumentality used in foreign commerce and, in particular, to a foreign-owned object or instrumentality so used.

An apportioned property tax may be appropriate in the case of interstate commerce due to the ability of this Court to act as the final arbiter with respect to apportionment disputes. However, as noted in *Scandinavian Airlines System* v. *County of Los Angeles,* 56 Cal.2d 11, 14 Cal.Rptr. 25, 363 P.2d 56 (1961), in regard to application of the apportionment principle in the context of international commerce:

> "[t]he apportionment basis of taxation is unworkable because the courts of this country can exercise no control over the foreign taxing authorities."
>
> 14 Cal. Rptr. at p. 38.

The California Supreme Court erroneously concluded in the instant case that the "home port" doctrine is no longer valid since in *Ott* it was held that the states would not be in violation of the Commerce Clause by imposing an apportioned property tax upon *interstate* inland barge traffic. It is submitted that the "home port" doctrine is still valid in the case of foreign-owned instrumentalities used in foreign commerce. The doctrine merely has been held inapplicable to state taxation of instrumentalities of *interstate* commerce (barges and aircraft) *owned by domestic persons.*

This Court specifically limited its conclusion in *Ott to interstate commerce* by stating:

> ". . . we do not reach the question of taxability of ocean carriage but confine our decision to transportation on inland water."
>
> 336 U.S. at 173-174.

Moreover, the concurring opinion of Justice Jackson, in *Northwest Airlines, Inc.*, characterized the apportionment theory as a "practical but rather illogical, device to prevent duplication of tax burdens on vehicles in transit" but that "the best analogy that I find in existing decisions is the 'home port' theory applied to ships." 322 U.S. at p. 306. Even in *Braniff*, the Court was careful to note that:

> "We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on *river* boats."
>
> 347 U.S. at 600. (Emphasis added.)

It is clear from the foregoing that the "home port" doctrine, as applied to instrumentalities of *foreign commerce*, is as valid and viable today as it was over a century ago when it was prescribed by this Court.

According to the briefs submitted by Appellees in the various courts of the State of California, the avowed purpose of the imposition of local property taxes upon containers owned by Appellants is to recover the costs of services and benefits in the nature of fire and police protection and road facilities afforded by Appellees to Appellants. However, according to statements prepared by the County of Los Angeles, it appears that less than two to three percent of the revenues collected were so expended. Accordingly, the amount of property taxes collected by Ap-

pellees from Appellants is totally disproportionate to the services, benefits and protection afforded by Appellees to Appellants.

If the instant decision is not overruled, there is a substantial risk that other foreign governments will retaliate against U.S.-owned containers. The proliferation of the incidence of the imposition of local property taxes upon foreign-owned containers could result in multiple taxation and the creation of a significant burden upon international trade, that is totally disproportionate to the cost of local services, benefits and protections provided by the local taxing authority to the foreign-owned containers.

3. Due Process Clause

Although the issue was not specifically argued and briefed below, it is inherent in the facts considered below that the taxes levied by Appellees do not bear a reasonable relationship to Appellants' container activities within Appellees' respective jurisdictions and the benefits conferred by Appellees in relation to such activity. In the absence of such a relationship, the imposition of tax violates the Due Process Clause. *See, General Motors* v. *District of Columbia*, 380 U.S. 553, 561 (1965); *and Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435 (1940).

In the context of property taxation, "due process" requires *situs* of the property within the taxing jurisdiction. *See, e.g., Braniff Airways, Inc.*, 347 U.S. at 598-9, and the cases cited therein. The tax which Appellees have imposed is based upon an apportionment made pursuant to an "average presence" formula that in no way is authorized by the taxing statute or regulations issued thereunder. *Compare, e.g., Braniff Airways, Inc.*, which involved the constitutionality of a state statute that specifically provided for the taxation of aircraft, used in interstate com-

merce, upon an apportionment basis. The utilization by Appellees of such an "average presence" formula is contrary to the provisions of Section 205, Title 18, California Administrative Code, which provides that before a specific item of movable property will be considered to have a taxable *situs* in the taxing jurisdiction, it must be present there for six of the twelve months preceding the lien date. The repeal of this provision by the Appellees, through administrative fiat and replacement thereof with the "average presence" provision, is unjustifiable particularly in light of the apparent conflict with existing law within the State. Consequently, Appellees have imposed a tax on property which, pursuant to Section 205, Title 18, California Administrative Code, lacks a taxable *situs* within, and, therefore, a reasonable relationship to, the territorial limits of Appellees.

Moreover, Appellees have attempted to justify the tax imposed on the basis of police, fire protection and road usage afforded to the property of Appellants. This justification clearly falls outside of the limitations described in *Wisconsin* v. *J.C. Penney Co.*, inasmuch as less than two to three percent of the funds collected generally from property taxes are devoted to police, fire protection and road construction and maintenance. The imposition of a tax, on the basis of an arbitrary and capricious allocation formula in a case where the tax bears little or no relationship to the benefit provided, raises a substantial Federal question which must be resolved by this Court.

4. Treaty Power

The Commerce Clause vests in the Congress the plenary power to regulate foreign commerce. The Federal government has concluded with 17 foreign governments FCN Treaties, which typically contain a "non-discriminatory

taxation"* provision as reflected in Appendix C. The FCN Treaty with Japan also includes a provision against the imposition of a tax on income or capital in excess of that reasonably allocable to the territory of an FCN Treaty partner.

The imposition of property tax in this case results in the incidence of double taxation upon Japanese-owned containers used in the transport of goods between Japan and the United States. Double taxation does not exist in the case of U.S.-owned containers used in the same trade. The incidence of such double taxation is in violation of Article XI(1) and (4) of the FCN Treaty with Japan.

The FCN Treaty with Japan contains a "most-favored-nation" provision, which, in the instant circumstances, enables Appellants to enjoy the benefits of the Container Convention for the tax years 1970 and 1971, before Japan became a signatory to the Container Convention.

The concern of various governments regarding the imposition of local property taxes upon containers used in foreign commerce is further evidenced by the execution on May 18, 1956, of the Container Convention. The United States and Japan became parties thereto as of March 3, 1969 and May 22, 1971, respectively. The purpose of the

---

* The above-described provision appears in the FCN Treaties with the following countries, either in the same form as appears in the case of the FCN Treaty with Japan or in a form similar in content: (i) Belgium, Article IX(1) (1963); (ii) Denmark, Article XI(1) (1961); (iii) Ethiopia, Article X(1) (1953); (iv) Federal Republic of Germany, Article XI(1) (1956); (v) Greece, Article XVI(1) (1954); (vi) Israel, Article XI(1) (1954); (vii) Iran, Article VI(1) (1957); (viii) Ireland, Article IX(1)(b) (1950); (ix) Italy, Article IX(1) (1949); (x) Korea, Article XI(1) (1957); (xi) Luxembourg, Article X(1) (1963); (xii) The Netherlands, Article XI(1) (1957); (xiii) Nicaragua, Article XI(1) (1958); (xiv) Pakistan, Article XI(1) (1961); (xv) Thailand, Article VI(1) (1968).

Container Convention is "to develop and facilitate the use of containers in international traffic." *See,* Preamble to the Container Convention. To this end, the contracting parties agreed to:

> ". . . grant temporary admission free of import duties and import taxes and free of import prohibitions and restrictions, subject to re-exportation and to other conditions laid down in articles 3 to 6 below, to containers when they are imported loaded to be re-exported either empty or loaded, imported empty to be re-exported loaded."
>
> Container Convention, Chapter II, Article 2.

To eliminate the possibility of unduly narrow construction of the term "import duties and import taxes," the Container Convention defines the terms to mean:

> ". . . not only customs duties but also all duties and taxes whatsoever chargeable by reason of importation."
>
> Container Convention, Chapter I, Article 1(a).

While the Container Convention does not specify that it was intended to apply to duties and taxes on importation levied by the states or local governments, the wording of the Container Convention makes it clear that the term "import duties and import taxes" includes "all duties and taxes whatsoever chargeable by reason of importation." In this sense, the Container Convention, insofar as the United States is concerned, restates the prohibition contained in Article I, Section 10, Clause 2, as it was perceived and understood by the foreign treaty partners of the United States at the time the Container Convention was executed. Moreover, it was the Japanese Government itself

that suggested to Appellants that this question was governed by the Container Convention.

Aside from the foregoing treaties, the United States on January 1, 1948 entered into the GATT which raises a question whether the taxes levied by Appellees are in violation of Article III, paragraphs 1 and 2 thereof. Foreign-owned containers must either be regarded as instrumentalities of commerce in their own right or as an integral part of the vessels upon which such goods are shipped. Any internal local tax imposed on the containers will ultimately produce an adverse effect upon the price at which the goods transported therein are sold. The imposition of a direct property tax on foreign-owned containers (which themselves are inseparable from the goods they contain until such goods reach a final point of destination) is, in reality, an indirect tax upon the goods themselves. Given the more burdensome taxation to which foreign-owned containers, used in foreign commerce, are subject (as contrasted with the more favorable overall taxation to which United States persons are subject), the imposition of property taxes by Appellees clearly results in an internal charge on imports in excess of charges borne by like domestic products shipped within this country or in export.

The foreign trading and treaty partners of the United States have acted in reliance upon their interpretation and understanding of the Constitution and the above mentioned treaties, as evidenced by the fact that foreign-owned (including United States-owned) containers are not subject to taxation by such foreign trading and treaty partners. The conduct of the parties to a treaty is relevant for purposes of interpreting the relevant treaty provisions. *Factor* v. *Laubenheimer,* 290 U.S. 276, 294-5 (1933). *See, also, Choctaw Nations* v. *United States,* 318 U.S. 423 (1943).

The power to enter into treaties with foreign nations is vested in the President, as the Chief Executive of the United States, by Article II, Section 2, Clause 2 of the Constitution. Once the President, pursuant to the Treaty Power, has made a treaty on behalf of the Federal Government, no state has the power to act in contravention thereof. *See,* Article VI, Cl. 2, the Supremacy Clause; *and Missouri* v. *Holland,* 252 U.S. 416 (1920).

When the taxes imposed upon Appellants' containers are examined in the light of the above treaties and the GATT, there is a substantial Federal question whether such taxes are in contravention of the provisions prohibiting: (i) "more burdensome taxation"; (ii) "taxation in excess of that reasonably attributable to the territory of Appellees"; and (iii) the levy of "all taxes whatsoever chargeable by reason of importation." That treaties must be ratified by Congress further creates a presumption that Congress has acted in the area of foreign commerce, particularly regarding the taxes that may be imposed in respect of importation, thereby precluding state action.

CONCLUSION

The decision of the California Supreme Court is incorrect since it fails to recognize that the levy of property taxes upon foreign-owned containers, used exclusively in foreign commerce and present within the territorial limits of Appellees for only temporary periods as part of an international voyage, is contrary to the Import-Export, Prohibition of Tonnage Duties, Commerce and Due Process Clauses of the Constitution. Furthermore, the imposition of such taxes is contrary to the FCN Treaty with Japan, the Container Convention and the GATT and, therefore, is

contrary to the Supremacy Clause of the Constitution. The questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

Peter L. Briger, Esq.
Briger & Associates
299 Park Avenue
New York, New York 10017

Sheldon S. Cohen, Esq.,
Cohen & Uretz
1775 K Street, N.W.
Washington, D.C. 20006

Reed M. Williams, Esq.,
Ronald L. Young, Esq.,
Graham & James
100 Oceangate, Suite 515
Long Beach, Calif. 90802

Counsel for Appellants

APPENDIX

Appendix A

In the

Supreme Court of the State of California

L.A. 30703

Super. Ct. Nos. SO C-25617, SO C-27593, SO C-30557

Japan Line, Ltd., *et al.*,

Plaintiffs and Respondents,

v.

County of Los Angeles, *et al.*,

Defendants and Appellants.

In this action for recovery of ad valorem personal property taxes paid under protest, defendants City of Los Angeles and County of Los Angeles appeal from a judgment entered after a nonjury trial in favor of plaintiffs and against defendants for the recovery of said taxes together with interest and costs. After decision by the Court of Appeal, Second Appellate District, Division Three, reversing the judgment, we granted a hearing in this court for the purpose of giving further consideration to the issues raised. Having made a thorough examination of the cause, we have concluded that the opinion of the Court of Appeal prepared by Justice Cobey and concurred in by Acting Presiding Justice Allport and Justice Potter correctly treats and disposes of the issues involved and we adopt such

opinion as and for the opinion of this court. That opinion (with appropriate additions and deletions) is as follows:*

The sole question presented by this appeal upon an agreed statement from a tax refund judgment is whether appellants, the County of Los Angeles and the City of Los Angeles, may impose an apportioned ad valorem tax upon cargo shipping containers, taxed in Japan, used here essentially exclusively in foreign commerce and owned and controlled by Japanese taxpayers. These taxpayers are six shipping lines incorporated under the laws of Japan which have their principal places of business and commercial domiciles there.

Facts

The facts as stipulated between the parties disclose that the containers at issue are in constant transit save for repair time and time awaiting new cargo. They are only intermittently physically present within the jurisdictions of appellants for an average stay of less than three weeks. They are used exclusively for the transportation of cargo for hire in foreign commerce. They are either full or empty. The full containers are loaded with cargo inbound from or outbound to foreign ports. The empty containers are moved intrastate within California and interstate from

* Brackets together, in this manner [] *without enclosing material*, are used to indicate deletions from the opinion of the Court of Appeal; brackets *enclosing material* (other than editor's parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court. We thus avoid the extension of quotation marks within quotation marks, which would be incident to the use of such conventional punctuation, and at the same time accurately indicate the matter quoted. In so doing, we adhere to a method of adoption employed by us in the past. (See Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 311, fn. 2, and cases there cited.)

California solely to pick up cargo to be carried in foreign commerce or to return the containers themselves to ports (principally Los Angeles) for placement aboard the taxpayers' outbound vessels. The containers are never used for either intrastate or interstate transportation of cargo except in continuation of international voyages.

The Taxpayers' Contentions

Since the judgment under appeal was rendered, [] [this court] decided unanimously in the case of Sea-Land Service, Inc. v. County of Alameda [1974] 12 Cal.3d 772, 775-776, that a California county may tax such containers, under circumstances of use essentially identical to those before us, where the containers were used mainly in foreign commerce[1] but were owned by a shipping company incorporated and commercially domiciled within this country.

The taxpayers contend that the *Sea-Land* decision is not dispositive of this case because, there, Sea-Land conceded that its containers were subject to local taxation within the United States. Its position was that such taxation must be done exclusively at the home port of its vessels. (*Sea-Land, supra,* at pp. 781, 786). Here, the home ports of the taxpayers' vessels, which are specifically designed to carry the containers at issue, are in Japan. The taxpayers' vessels are likewise registered there rather than in the United States.

The initial position of the taxpayers on this appeal was that under both the home-port doctrine and the most fa-

[1] The interstate commerce therein involved was via international waters between California and the East Coast of the United States. (*Sea-Land, supra,* at p. 776.) [] [This] court made no distinction between the containers used in foreign commerce and those used in intercoastal commerce.

vored nation provisions of the 1953 treaty between the United States and Japan their containers are not subject to taxation by any jurisdiction except Japan.[2] In this connection, we note that the containers of the taxpayers are subject to property taxation in Japan and have actually been so taxed there. Similar containers, similarly used in Japan but owned and controlled by steamship companies domiciled in the United States, have not been so taxed there.

At oral argument [before the Court of Appeal] counsel for the taxpayers advanced a new ground and an additional factual basis for their position that their containers, notwithstanding the continuous use of the containers in the United States within appellants' jurisdictions, are not subject to property taxation by any government except that of Japan. They there argued that the property taxes at issue constitute indirect tonnage duties prohibited by article I, section 10, clause 3 of the United States Constitution and, in support of one of their initial contentions that these taxes are also prohibited by applicable treaties, called our attention for the first time to the existence of the supplementary convention of 1964 (15 U.S.T. 1824) to the 1939 convention between Sweden and the United States on double taxation. (54 Stat. 1759.)

---

[2] The taxpayers do not now claim though that their cargo containers have not acquired a taxable situs within California. In any event, the following language [] in ***Sea-Land, supra,*** 12 Cal.3d at p. 778, would appear to be entirely apposite: "While no specific container may be in the county for a substantial period of time, Sea-Land's containers are physically in the county every day of the year. Such habitual presence of containers creates a taxable situs, even though the identical containers are not there every day and even though none of the containers is continuously within the county." (Citations omitted.)

We could disregard this new matter without any consideration thereof because, without any showing of justification therefor, it was presented after the normal briefing process had been concluded. (See Lotts v. Board of Park Commrs. [1936] 13 Cal.App.2d 625, 636; Sinclair v. Aquarius Electronics, Inc. [1974] 42 Cal.App.3d 216, 229.) But in the interest of being as fully informed as reasonably possible on the fundamental tax issue presented, [] [the Court of Appeal] waived this obvious impropriety in the taxpayers' appellate procedure and asked for and obtained from the parties supplemental briefs on the new matter.

Discussion

1. *The Home-port Doctrine*

The taxpayers concede that in the field of interstate commerce the home-port doctrine has been superseded by the apportionment doctrine, but they argue that it is still extant in the area of foreign commerce where apportionment cannot be substituted except perhaps by treaty or other agreement. [] [They urge that] in Scandinavian Airlines System, Inc. v. County of Los Angeles [1961] 56 Cal.2d 11, 15, 17, 33, 36-37 (hereafter *SAS*), [this court] applied the home-port doctrine to foreign owned, based, registered and taxed airplanes flying exclusively in foreign commerce and using Los Angeles quite infrequently as their sole United States terminus and thereby struck down the apportioned property taxes upon such planes which appellants had imposed.

[] [However, in *Sea-Land* we specifically addressed this very contention (12 Cal. 3d at pp. 784-786), namely that the home-port doctrine retained vitality with respect to foreign commerce as distinguished from interstate com-

merce pursuant to our decision in *SAS*, and clearly rejected it. First, we concluded that "we are not inhibited by *SAS* from concluding that the home-port doctrine does not shield the property of a taxpayer from a fairly apportioned ad valorem tax levied by a nondomiciliary jurisdiction with which the taxpayer has sufficient contacts, even if the taxpayer is engaged in foreign commerce. . . . The principles of apportioned taxation enunciated in *Pullman*, *Ott* and *Braniff* are to be applied to instrumentalities so engaged." (*Id.* at p. 786.) Second, we specifically adopted the reasoning of Justice Traynor in his dissent in *SAS* to the effect that the threat of double taxation from foreign taxing authorities has no role in commerce clause considerations of multiple burdens, since burdens in international commerce are not attributable to discrimination by the taxing state and are matters for international agreement. (*Id.* at p. 788.)

The only asserted distinction between the case at bench and *Sea-Land* is that the cargo shipping containers in *Sea-Land* were owned by a United States corporation whereas the containers herein are owned by foreign corporations. The taxpayers have failed to cite any authority which would support a conclusion that instrumentalities of commerce used in foreign commerce are subject to different constitutional protection depending upon whether they are owned by foreign or domestic corporations. Existing authority supports the opposite conclusion. For example in Canadian Pac. Ry. Co. v. King Co. (1916) 90 Wash. 38, the Washington Supreme Court rejected the home-port doctrine and applied to a Canadian railway corporation the apportionment rule applied by the United States Supreme Court to the rolling stock of a domestic railway corporation used in foreign commerce in Pullman's Car Co. v.

Pennsylvania (1891) 141 U.S. 18, 23. *Sea-Land* is fully dispositive of the commerce clause and federal exclusivity issues raised in the case at bench.]

2. *The Tonnage Duty Prohibition*

Article I, section 10, clause 3 of the United States Constitution prohibits the imposition by states [] of tonnage duties. The taxpayers contend that this prohibition invalidates the local property taxes at issue since they in practical effect are tonnage duties upon the cargo containers.

We disagree. In the recent case of Michelin Tire Corp. v. Wages (1976) 423 U.S. 276, the United States Supreme Court held that the assessment by Georgia of a nondiscriminatory ad valorem property tax against imported tires was not within the constitutional prohibition against the laying of any impost or duty on imports. In support of this holding the court pointed out that imposts and duties "are essentially taxes on the commercial privilege of bringing goods into a country," while nondiscriminatory ad valorem property taxes of the kind before us are taxes by which a state apportions the costs of its general services among the beneficiaries thereof (*Michelin, supra*, at pp. 286-287) and that the words "imposts" and "duties," as used in 1787, clearly meant only "exactions upon imported goods *as imports.*" (Italics added.) (*Id.* at pp. 290-291, 283.)[3] []

---

[3] In *Sea-Land, supra*, 12 Cal.3d at p. 789, [] [we] expressly rejected the contention that the similar cargo containers therein involved were exempted from local property taxation by the [] [import-export] clause of the United States Constitution. [] [T]he protection against local taxation afforded by that clause extended only to goods and commodities in the import-export stream and not to the containers which were merely a means of transport suitable for repeated use.

[The taxpayers contend that the *Michelin* holding that a nondiscriminatory ad valorem property tax was not an "impost" or "duty" is not determinative of the case at bench because the cargo containers herein were in import-export transit. They urge that the court in *Michelin* specifically stressed that the goods in that case were no longer in import transit. (See 423 U.S. at pp. 286, 302.) The contention is of no avail to taxpayers.

The cargo containers are not being taxed while in transit. Rather they are being taxed on an apportioned basis for their continuous presence in the state. Some containers are continuously present in the state throughout the year, even though not necessarily the same containers. The continuous presence of these containers, as well as any instrumentality of commerce, involves the constant use of many services provided by the state and, here, the county; e.g., harbor facilities, roads, bridges, water supply, as well as fire and police protection. The Supreme Court has held that states may impose a property tax on these moving instrumentalities of commerce on an apportioned basis in order to meet the expenses of services within the taxing jurisdiction. (Clyde Mallory Lines v. Alabama (1935) 296 U.S. 261, 265-266; Cox v. Lott (1870) 79 U.S. 204, 213; Pullman's Car Co. v. Pennsylvania, *supra,* 141 U.S. 18.) In *Sea-Land* we affirmed the apportionment formula used in the case at bench to determine the continuous presence of the cargo containers there involved. It is the continuous presence within the jurisdiction drawing upon the service of that jurisdiction to a significant degree which permits reimbursement through nondiscriminatory property taxation as opposed to the fleeting presence of imported goods in transit which may possibly be exempted from such taxation by *Michelin.*

If *Michelin* is inapplicable to resolution of the issues herein as taxpayers contend, then the traditional tonnage clause analysis applies, *viz.,* while the tonnage clause prohibits states from taxing access to their territories, it does not prohibit states from making charges for services rendered and enjoyed by those instrumentalities of foreign or interstate commerce within their jurisdiction. (Clyde Mallory Lines v. Alabama, *supra,* 296 U.S. 261, 265-266; Cox v. Lott, *supra,* 79 U.S. 204, 213.) The court in *Michelin* pointed out that nondiscriminatory ad valorem property taxes are taxes by which the state apportions the costs of services, such as police and fire protection. (423 U.S. at p. 287.) Even under traditional tonnage clause analysis this property tax would be valid.

Thus plaintiffs' further insistent assertion that the tax liability is created by entry into the taxing jurisdiction must fall and with it the contention that the tax herein is a tonnage duty levied upon the entry of the containers into the jurisdiction.]

3. *The Treaty Question*

The taxpayers contend that the local taxation at issue violates certain treaty obligations of the United States and is therefore invalid under the supremacy clause of the United States Constitution (art. VI, cl. 2). (*SAS; supra,* 56 Cal.2d 11, 37.) In support of this contention they point out first, that the aforementioned 1953 treaty between the United States and Japan (4 U.S.T. 2063) contains most favored nation provisions with respect to the ownership and possession of movable property and taxes. (Art. IX, § 2; art. XI, § 3; art. XXII, § 2; 4 U.S.T. 2071, 2072, 2079.) They then note that in the just-mentioned *SAS* case [] [we] held that the terms of the previously mentioned 1939

convention between the United States and Sweden respecting double taxation (54 Stat. 1759) prevented appellants herein from generally taxing Swedish-owned property, including particularly airplanes (56 Cal.2d at p. 39) and, therefore, the Japanese-owned containers before us are likewise exempt from taxation by appellants pursuant to the just mentioned most favored nation provisions of the 1953 treaty between the United States and Japan. [] [This court in *SAS*] based its holding largely on the provisions of article XIII, subdivision 2 of the Swedish convention (54 Stat. 1766), applying generally apparently to movable property, but the taxpayers argue that their containers are also exempt from local property taxation by appellants under other provisions of the aforementioned Swedish convention (arts. IV and XIII, subd. (1)(b); 54 Stat. 1761, 1766) exempting instrumentalities of foreign commerce (i.e., ships and airplanes). Finally, the taxpayers argue that by reason of the modification made in the Swedish convention by the aforementioned 1964 supplementary convention thereto (15 U.S.T. 1825) the local property taxation of appellants at issue is precluded by the provision in the convention prohibiting nonreciprocal taxation.[4]

We reject the foregoing argument totally. We do not think that either the holding of the *SAS* case or the supplementary convention (which came into existence after the *SAS* decision) invalidates appellants' nondiscriminatory ad valorem taxation of these containers. The *SAS* holding on its facts prohibits only local taxation of foreign owned, based and registered *airplanes*. (56 Cal.2d at p. 42.) It does not apply to cargo containers as such. The taxpayers seek to extend this holding nevertheless and the relevant treaty prohibitions as well by describing both the airplanes involved in the *SAS* case and the containers involved here as instrumentalities of commerce. This generic description of ships and airplanes does not appear, in the relevant provisions of the 1939 convention between Sweden and the United States. [] In any event, so far as the convention with Sweden is concerned, [] [as] Justice Traynor pointed out in his dissent in the *SAS* case that, properly interpreted, this treaty does not apply to local property taxation at all. (56 Cal.2d at pp. 47-48.)

The same thing, however, cannot be said with the respect to the supplementary convention thereto. But in advising ratification by the United States of this convention, the United States Senate did so on the basis of a report from its Foreign Relations Committee, which stated that the replacement paragraph in its protocol (which we quoted in fn. 4) merely restated "for the sake of clarity" the requirement of its predecessor paragraph of non-discriminatory tax treatment as between citizens and non-citizens (Tax Conventions and Protocols with Luxembourg, the Netherlands, Sweden and Japan, Rep. of the Sen. Foreign Relations Com., Ex. Rep. No. 10, 88th Cong, 2d Sess. at p. 65 (1964)).[5] Admittedly, the taxation at issue in this case does not violate this requirement.

---

[4] The supplementary convention, among other things, replaced paragraph 7 of its protocol (54 Stat. 1777) with a new paragraph 7, reading as follows:

> "7. The citizens of one of the contracting States shall not, while resident in the other State, be subject therein to other or more burdensome taxes than are citizens of that other State residing in its territory. The term 'citizens' as used in this paragraph, includes also all legal persons, partnerships, and associations created or organized under the laws in force in the respective contracting State. In this paragraph the word 'taxes' means taxes of every kind or description, whether Federal[,] State, or municipal." (15 U.S.T. 1831-1832.)

[5] In determining the effect of an international agreement as domestic law, a court of the United States is to some extent re-

Appendix A

DISPOSITION

The judgment is reversed.

[]

MANUEL, J.

WE CONCUR:

Bird, C.J.
Tobriner, J.
Mosk, J.
Clark, J.
Richardson, J.
*Jefferson, J.

*Assigned by the Chairperson of the Judicial Council.

SUPREME COURT
FILED
Nov 18 1977
G. E. BISHEL, Clerk

quired to take into account domestic sources in the formation of an international agreement such as committee reports indicative of the meaning that the United States Senate has attached to an international agreement in cases where the agreement, as a matter of international law, requires the assent of the Senate (Rest. 2d Foreign Relations Law of the United States (1965) § 151, com. (b)(i), pp. 462-463; compare Traynor, J., dissent, *SAS*, *supra*, 56 Cal.2d at p. 48).

Appendix A

COPY

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

L.A. 30703

Super. Ct. Nos. SO C-25617, SO C-27593, SO C-30557

JAPAN LINE, LTD., *et al.*,
Plaintiffs and Respondents,

v.

COUNTY OF LOS ANGELES, *et al.*,
Defendants and Appellants.

ORDER MODIFYING OPINION

THE COURT:

It is ordered that the opinion filed herein on November 18, 1977, and reported in the Official Reports (20 Cal.3d 180) be modified in the following particulars:

1. On page 187, line 7 of the second full paragraph, the words "the county" are changed to the words "local entities" so the sentence reads:

> The continuous presence of these containers, as well as any instrumentality of commerce, involves the constant use of many facilities provided by the state and here, local entities; e.g., harbor facilities, roads, bridges, water supply, as well as fire and police protection.

SUPREME COURT
FILED
DEC 28 1977
G. E. BISHEL, Clerk

Appendix A

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

DEC 28 1977

I have this day filed Order ....

REHEARING DENIED

In re: L.A. No. 30703

JAPAN LINE, LTD.,

vs.

COUNTY OF LOS ANGELES.

Respectfully,

G. E. BISHEL
Clerk

Appendix A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
NOS. SO C-25617, 27593, 30557

JAPAN LINE, LTD., *et al.*,
Plaintiffs,

v.

COUNTY OF LOS ANGELES AND CITY OF LOS ANGELES,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These consolidated causes came on regularly for trial on February 14, 1974, before the Court sitting without a jury.

Plaintiffs appeared through Graham & James and Reed M. Williams. Defendants appeared through John H. Larson, County Counsel, and James Dexter Clark, Deputy County Counsel. Having heard the testimony and examined the proofs, and matters admitted and deemed admitted by defendants under C.C.P. §2033(a), and having considered the briefs and arguments of the parties, and the causes having been submitted for decision, and being fully advised in the premises, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. On the first day of March, 1970, 1971 and 1972, there were present in the City of Los Angeles and the County of Los Angeles certain cargo shipping containers owned and

controlled by plaintiffs, the fair market values and assessed values being as follows:

Fair Market Values

Plaintiff	*1970*	*1971*	*1972*
Japan Line, Ltd.	$ 765,000	$ 885,550	$1,696,900
Kawasaki Kisen Kaisha, Ltd.	1,250,100	977,720	1,768,280
Mitsui O.S.K. Lines, Ltd.	1,251,000	1,228,860	1,342,200
Nippon Yusen Kaisha	1,389,000	1,213,400	1,173,920
Showa Shipping Co.	595,000	553,200	564,340
Yamashita-Shinnihon Steamship Co., Ltd.	824,000	835,400	731,040

Assessed Values

Plaintiff	*1970*	*1971*	*1972*
Japan Line, Ltd.	$ 191,250	$ 221,375	$ 424,225
Kawasaki Kisen Kaisha, Ltd.	312,525	244,430	442,070
Mitsui O.S.K. Lines, Ltd.	312,750	307,215	335,550
Nippon Yusen Kaisha	347,250	303,350	293,480
Showa Shipping Co.	148,750	138,300	141,085
Yamashita-Shinnihon Steamship Co., Ltd.	206,000	208,850	182,760

2. Defendants assessed, and levied taxes as follows against plaintiffs with respect to said containers. The amounts of said taxes are properly calculated as follows:

Plaintiff	*1970*	*1971*	*1972*
Japan Line, Ltd.	$20,512.32	$25,822.70	$54,297.83
Kawasaki Kisen Kaisha, Ltd.	33,519.55	27,515.03	56,581.86
Mitsui O.S.K. Lines, Ltd.	33,543.68	34,763.52	42,948.05
Nippon Yusen Kaisha	37,243.95	35,367.71	37,563.38
Showa Shipping Co.	15,954.03	16,628.77	18,057.89
Yamashita-Shinnihon Steamship Co., Ltd.	22,094.22	23,930.17	23,392.00

3. Plaintiffs timely paid said taxes, under protest, as follows:

Tax Year	*Date of Payment*
1970-1971	March 2, 1971
1971-1972	August 31, 1971
1972-1973	August 31, 1972

4. Plaintiffs' suits for refund of said taxes were filed within six months from the date of payment of said taxes.

5. No refund of said taxes has been made.

6. Plaintiffs are incorporated under the laws of Japan, and have their principal places of business and commercial domiciles in Japan.

7. All of plaintiffs' vessels, on which the said containers are carried, have their home port in and are registered in Japan, and are used exclusively in foreign commerce.

8. All of plaintiffs' vessels on which the said containers are carried are specifically designed and constructed to accommodate the said containers, and carry cargo only in said containers.

9. Said containers have their home port in Japan, and are used constantly and exclusively for the transportation of cargo for hire in foreign commerce.

10. No container has a usual place of return in California or the United States between uses.

11. Each container is in constant transit save for repair time, and time awaiting the loading of cargo.

12. None of the containers present in Los Angeles County on the first day of March, 1970, 1971, or 1972 had been in California for as much as six months during the twelve months immediately preceding said dates.

13. The average stay of any of the containers in California at any one time is less than three weeks.

14. All containers of plaintiffs are subject to property tax, and are in fact taxed, in Japan.

15. During all periods referred to in plaintiffs' complaints those cargo shipping containers owned or controlled by steamship companies domiciled in the United States, and which from time to time were located in Japan while engaged in receiving and delivering cargo (being transported in foreign commerce) and awaiting shipment by vessel, were not subject to property taxation in Japan, and were not taxed in Japan.

16. The number of containers physically present in Los Angeles County on the lien dates 1970, 1971 and 1972, is fairly representative of the number of containers present in Los Angeles County on other dates throughout the tax year.

17. Any movements, or periods of non-movement of any said containers while in the United S ates (whether said containers are empty or filled with c rgo) are incidental to and inseparable from the use of said containers in the transportation of cargo in foreign commerce, any such movements or periods of non-movement being essential to and solely for the efficiency and economic utilization of the containers as instrumentalities of foreign commerce.

Conclusions of Law

1. Said containers, as utilized by plaintiffs at all times relevant hereto, are instrumentalities of foreign commerce.

2. That said containers are exempt from taxation by defendants.

3. That defendants unlawfully collected those taxes from plaintiffs as set forth in Findings of Fact No. 2.

4. That plaintiffs are entitled to a refund of said taxes.

5. That plaintiffs have judgment against defendants for the following sums:

Plaintiff	*Sum*
Japan Line, Ltd.	$100,632.85
Kawasaki Kisen Kaisha, Ltd.	117,616.44
Mitsui O.S.K. Lines, Ltd.	111,255.25
Nippon Yusen Kaisha	110,175.04
Showa Shipping Co.	50,640.69
Yamashita-Shinnihon Steamship Co., Ltd.	69,416.39

together with interest pursuant to California Revenue and Taxation Code §5141 computed from the dates and on the amounts of payment as follows, until entry of judgment,

Plaintiff	*Mar. 2, '71*	*Aug. 31, '71*	*Aug. 31, '72*
Japan Line, Ltd.	$20,512.32	$25,822.70	$54,297.83
Kawasaki Kisen Kaisha, Ltd.	33,519.55	27,515.03	56,581.86
Mitsui O.S.K. Lines, Ltd.	33,543.68	34,763.52	42,948.05
Nippon Yusen Kaisha	37,243.95	35,367.71	37,563.38
Showa Shipping Co.	15,954.03	16,628.77	18,057.89
Yamashita-Shinnihon Steamship Co., Ltd.	22,094.22	23,930.17	23,392.00

together with costs of suit herein.

Let judgment be entered accordingly.

Dated: Oct. 15, 1974

/s/ Hampton Hutton
Judge

Superior Court of the State of California
For the County of Los Angeles
No. SO C 25617, SO C 27593, SO C 30557

Japan Line, Ltd., *et al.*,
Plaintiffs,

v.

County of Los Angeles and City of Los Angeles,
Defendants.

Judgment

The above entitled causes came on regularly for trial on February 14, 1974. Graham & James and Reed M. Williams appeared as attorneys for plaintiffs. John H. Larson, County Counsel, and James Dexter Clark, Deputy County Counsel, appeared as attorneys for defendants. A jury trial having been waived, and the Court having heard the testimony and having heard and considered the evidence and the matters admitted by the parties, and the Court being fully advised in the premises and having filed its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith, now therefore by reason of the law and findings aforesaid, and good cause appearing:

It Is Ordered, Adjudged and Decreed that plaintiffs have judgment against defendants in the following principal amounts, together with interest thereon, pursuant to California Revenue and Taxation Code §5141 from the dates specified hereafter to the date of entry of judgment;

Appendix A

Japan Line, Ltd.

Principal	$100,632.85
Interest	
($4,482.10 ($20,512.32 from 3-2-71)	
($3,877.50 ($25,822.70 from 8-31-71)	
($8,153.27 ($54,297.83 from 8-31-72)	
	$ 16,512.87
Total	$117,145.72

Kawasaki Kisen Kaisha, Ltd.

Principal	$117,616.44
Interest	
($7,324.27 ($33,519.55 from 3-2-71)	
($4,131.61 ($27,515.03 from 8-31-71)	
($8,496.25 ($56,581.86 from 8-31-72)	
	$ 19,952.13
Total	$137,568.57

Appendix A

Mitsui O.S.K. Lines, Ltd.

Principal	$111,255.25
Interest	
($7,329.55 ($33,543.68 from 3-2-71)	
($5,220.03 ($34,763.52 from 8-31-71)	
($6,449.02 ($42,948.05 from 8-21-72)	
	$ 18,998.60
Total	$130,253.85

Nippon Yusen Kaisha

Principal	$110,175.04
Interest	
($8,138.09 ($37,243.95 from 3-2-71)	
($5,310.76 ($35,367.71 from 8-31-71)	
($5,640.45 ($37,563.38 from 8-31-72)	
	$ 19,089.30
Total	$129,264.34

Appendix A

SHOWA SHIPPING CO., LTD.

Principal	$ 50,640.69
Interest	
($3,486.08 ($15,954.03 from 3-2-71)	
($2,496.95 ($16,628.77 from 8-31-71)	
($2,711.54 ($18,057.89 from 8-31-72)	
	$ 8,694.57
TOTAL	$ 59,335.26

YAMASHITA SHINNIHON STEAMSHIP CO., LTD.

Principal	$ 69,416.39
Interest	
($4,827.76 ($22,094.22 from 3-2-71)	
($3,593.31 ($23,930.17 from 8-31-71)	
($3,512.50 ($23,392.00 from 8-31-72)	
	$ 11,933.57
TOTAL	$ 81,349.96

together with costs of suit herein taxed in the amount of $.........................

DATED: Oct 15 1974

HAMPTON HUTTON
JUDGE OF THE SUPERIOR COURT

ORIGINAL FILE
OCT 15 1974
COUNTY CLERK

Appendix A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

(Consolidated for all purposes with :
SO C 27593 and SO C 30557)

No. SO C 25617

JAPAN LINE, LTD., *et al.*,

Plaintiffs,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Defendants.

No. SO C 27593

JAPAN LINE, LTD., *et al.*,

Plaintiffs,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Defendants.

No. SO C 30557

JAPAN LINE, LTD., *et al.*,

Plaintiffs,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Defendants.

INTENDED DECISION

The Court has before it three cases which were consolidated. They all have identical facts and parties, except that the periods in which an ad valorem tax was levied are different, to wit:

Case No. SO C 25617 — March 2, 1972

Case No. SO C 27593 — August 31, 1971

Case No. SO C 30557 — August 31, 1972

Briefly, Los Angeles County has levied a property tax on cargo containers used by the five [sic] Japanese shipping lines who are parties plaintiff, based on the average number of containers constantly in Los Angeles County. These containers are owned and controlled by Japanese based concerns and only come into this country for the purpose of bringing in cargoes or shipping them out in foreign commerce. There is no interstate or intrastate use. The taxes were paid for the periods indicated under protest and this suit to recover followed.

Another case identical in nature has been previously tried by this Court and decided for the plaintiff (SO C 23482). This decision was not appealed, but since that time the Court of Appeal has decided *Sea-Land* vs. *Alameda County,* (District 1, Div. 2) 36 C.A. (2) 825, and the defendant contends that that decision is controlling and at least calls for a reconsideration of the whole question.

The parties have stipulated to the facts and to the taxes paid each year, which exhibit is incorporated into this Intended Decision and made a part hereof as Exhibit A.

In SO C 23482, the Court found that the cargo containers were instrumentalities of foreign commerce and were a part

of the ship. The *Sea-Land* case has taken the position that they are only instrumentalities of commerce to the extent that they provide a means for transferring cargo from one form of transportation to another (at page 832). This would belie the idea that they are an extension of the ship. The distinction makes no difference and as "instrumentalities of foreign commerce" they are still afforded the benefits of the "Home Port" rule.

Sea-Land was concerned with a domestic corporation (New Jersey) engaged in both foreign, inter and intrastate commerce and here lies the difference. There was no consideration of the "Home Port" rule as that was not involved; nor was any thought given to foreign treaties so well discussed in *Scandinavian Airlines* vs. *County of Los Angeles,* 56 Cal. (2) 11, cert. denied, 368 U.S. 899.

This Court is of the opinion that nothing has changed since the last decision on this matter and, therefore, adopts that part of the previous decision relating to Federal law, Home Port rule, and treaties. It is as follows:

Our Supreme Court in the *Scandinavian Airlines* system case made it clear that "Foreign Commerce" is a federal matter exclusively. It further stated that if the tax is repugnant to the treaty it cannot stand. Two treaties were considered here: The "General Agreement on Tariffs and Trade" and the "Treaty of Friendship, Commerce and Navigation Between the United States and Japan".

In the previous decision by this Court it was remarked in the Intended Decision that the Court didn't think the "Most Favored Nation" rule was applicable and that it based its ruling on the Treaty of Friendship, Commerce and Navigation Between the United States and Japan (1953), and the particular Article XI therein which pro-

vides that parties engaged in trade within the territory of the other party shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object more burdensome than those borne by nationals of the host country.

A tax levied on the containers by Los Angeles County would violate this section, because it was stipulated that plaintiffs pay a tax in Japan. There is no way to prorate the same, as we do in interstate commerce. The Japanese would be paying a double tax, while a domestic company would, by reason of proration, be paying only one tax.

In addition to this, the Court now feels "The Most Favored Nation Rule" is likewise applicable, because we are favoring our nationals (by reason of only one total tax) as against our foreign parties.

It is also to be noted that U.S. companies pay no tax on containers in Japan (by stipulation). To allow the tax levy would result in unequal treatment of our foreign parties.

To consider proration of taxes with foreign entities is not practical. There is no tribunal that can adjudicate these rights unless it be the International Court and to invoke its services jurisdiction must be consented to by all parties. For this reason, our Federal Courts have consistently held that vessels which are instrumentalities of foreign commerce and engaged in foreign commerce can be taxed in their home port only.

Whether we consider the containers as a part of the ship or not, they do have a home port (Japan). They are engaged exclusively in foreign commerce and they are taxed in their home port so it presents no problem to extend to them the benefits of the "Home Port" rule.

The plaintiffs have conceded that certain generator sets were included in the taxes levied and that the tax on those was legal. The Court has, therefore, deducted stipulated amounts from the "Schedule of Payments" to reflect the true amounts in issue in this case.

Judgment will be for plaintiffs against defendants in amounts indicated in Exhibit A, plus interest at 7% per annum on the amounts indicated on Exhibit A under the particular plaintiff's name from the date of payment so indicated, excluding from such sums the portion thereof that was paid on generator sets.

Plaintiff will prepare judgment.

DATED: March 14, 1974.

HAMPTON HUTTON
Judge of the Superior Court

Appendix A

SCHEDULE OF PAYMENT DATES

Tax Year	Date of Payment	J Line	K Line	M-O Line	NYK	Showa	Y-S Line
70–71	3–2–71	$ 20,512.32	$ 33,519.55	$ 33,543.68	$ 37,243.95	$15,954.03	$22,094.22
71–72	8–31–71	26,617.46	29,389.52	36,938.60	36,473.89	16,628.77	25,111.49
72–73	8–31–72	54,297.83	56,581.86	42,948.05	37,563.38	18,057.89	23,392.00
		$101,427.61	$119,490.93	$113,430.33	$111,281.22	$50,640.96	$70,597.71
	LESS	$ 794.76	$ 1,874.49	$ 2,175.08	$ 1,106.18		$ 1,181.32
		$100,632.85	$117,616.44	$111,255.25	$110,175.04		$69,416.39

Appendix B

In the

Supreme Court of the State of California

No. 30703

Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; Showa Line, Ltd.; and Yamashita-Shinnihon Steamship Co., Ltd.,

Appellants,

—against—

County of Los Angeles; City of Los Angeles; and City of Long Beach,

Appellees.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Japan Line, Ltd., et al., the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California denying the petition for a rehearing on the affirmance of the dismissal of the complaint entered in this action on December 28, 1977.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Peter L. Briger
Briger & Associates
Counsel for Appellant
299 Park Avenue
New York, New York 10017

Appendix B

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 1978, copies of this Notice of Appeal were sent by airmail, postage prepaid, to James D. Clark, Deputy County Counsel, Los Angeles. I further certify that all parties required to be served have been served, namely:

County of Los Angeles;
City of Los Angeles; and,
City of Long Beach.

/s/ PETER L. BRIGER
Peter L. Briger
BRIGER & ASSOCIATES
299 Park Avenue
New York, New York 10017
(212) 758-4000
Counsel for Appellant

REED M. WILLIAMS, Esq.
RONALD L. YOUNG, Esq.
Of Counsel
GRAHAM & JAMES
100 Oceangate, Suite 515
Long Beach, California 90802

SHELDON S. COHEN, Esq.
Of Counsel
COHEN & URETZ
1775 K. Street, N.W.
Washington, D.C. 20006

Appendix C

Pertinent Provisions of the Customs Convention on Containers

Chapter I, Article 1(a):

"For the purposes of this Convention:

(a) The term 'import duties and import taxes' shall mean not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation."

Chapter II, Article 2:

"Each of the Contracting Parties shall grant temporary admission free of import duties and import taxes and free of import prohibitions and restrictions, subject to re-exportation and to the other conditions laid down in articles 3 to 6 below, to containers when they are imported loaded, or imported empty to be re-exported loaded. Each Contracting Party shall retain the right to withhold these facilities in the case of containers which are imported on purchase or otherwise taken into effective possession and control by a person resident or established in its territory; the same applies to containers imported from a country which does not apply the provisions of this Convention."

Pertinent Provisions of the Treaty of Friendship, Commerce and Navigation With Japan

Article XI(1):

"Nationals of either party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade . . . within the territories

of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions or any other object, or to requirements with respect to the levy or collection thereof, more burdensome than those borne by nationals and companies of such other party."

Article XI(4):

"In the case of companies of either Party engaged in trade or gainful pursuit within the territories of the other Party, and in the case of nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party but not resident therein, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories nor grant deductions and exemptions less than those reasonably allocated or apportionable to its territories. * * *"

Article XXII(2):

"The term 'most-favored-nation treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country."

Pertinent Provisions of the General Agreement on Tariffs and Trade

Article III, Paragraphs (1) and (2):

"The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and

requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic products."

"The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly, to like domestic products."

Title 18, California Administrative Code §205

"205. Movable Property.

(a) General. Movable Property is *all* property which is intended to be, and is, moved from time to time from one location to another . . . [Emphasis added].

"Movable property has situs where located on lien date *if it has been in the county for more than six of the twelve months immediately preceding the lien date* and if it is to remain in or be returned to the county for any substantial period during the twelve months immediately succeeding lien date . . . [Emphasis added].

"Property which does not have situs where located on the lien date pursuant to the previous paragraph has situs at the location where it is normally returned between uses or, *if there is no such location, at the principal place of business of the owner.*" [Emphasis added].

Appendix D

Extracts From Annual Report of the Board of Supervisors of the County of Los Angeles, Fiscal Year 1970-1971

(see opposite) ☞

COUNTY WIDE FUNDS

SCHEDULE 1-C

INCLUDED IN GENERAL COUNTY LEVY

STATEMENT OF REVENUE-ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1971

RECAPITULATION

Source	Estimated	Actual	Over Realized	Under Realized
Taxes	$ 757,942,640.00	$ 754,502,478.75	$	$ 3,440,161.25
Licenses and Permits	7,023,906.00	6,661,567.63		362,338.37
Fines, Forfeits and Penalties	5,912,688.00	6,280,361.08	367,673.08	
Revenue From Use of Money and Property	21,309,216.00	13,470,203.06		7,839,012.94
Aid From Other Governmental Agencies	875,218,931.00	878,253,272.59	3,034,341.59	
Charges for Current Services	248,192,685.00	145,227,161.71		102,965,523.29
Other Revenues	12,087,236.00	21,632,347.85*		33,719,583.85
TOTAL	$1,927,687,302.00	$1,782,762,696.97	$ NET	$146,924,605.01

IN DETAIL

GENERAL FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured	$ 665,793,624.00	$ 661,632,266.27	$	$ 4,161,357.73
Property Taxes-Current-Unsecured	58,008,601.00	57,603,454.37		405,146.63
Property Taxes-Prior-Secured		303,064.83*		303,064.83
Property Taxes-Prior-Unsecured		1,636,664.28	1,636,664.28	
Penalties and Costs on Delinquent Taxes	3,000,000.00	2,865,341.36		134,658.64
Sales and Use Taxes	11,329,030.00	11,008,251.04		320,778.96
Franchises	1,151,300.00	1,153,329.29	2,029.29	
Other Taxes	6,574,153.00	6,776,964.82	202,811.82	
Total Taxes	$ 745,856,708.00	$ 742,393,206.60	$ NET	$ 3,463,501.40
Licenses and Permits				
Animal Licenses	$ 986,679.00	$ 1,027,545.00	$ 40,866.00	$
Business Licenses	3,743,322.00	3,901,987.66	158,665.66	
Construction Permits	1,307,500.00	1,429,880.94	122,380.94	
Road Privileges and Permits	9,600.00	7,721.03		1,878.97
Zoning Permits	198,405.00	144,767.00		53,638.00
Other Licenses and Permits	772,000.00	142,666.00		629,334.00
Total Licences and Permits	$ 7,023,906.00	$ 6,661,567.63	$ NET	$ 362,338.37
Fines, Forfeits and Penalties				
Vehicle Code Fines	$ 2,313,130.00	$ 2,283,290.99	$	$ 29,839.01
Other Court Fines	2,022,384.00	2,476,296.29	453,912.29	
Forfeitures and Penalties	1,577,174.00	1,520,773.80		56,400.20
Total Fines, Forfeits and Penalties	$ 5,912,688.00	$ 6,280,361.08	$ 367,673.08	$ NET
Revenue From Use of Money and Property				
Interest	$ 17,890,010.00	$ 10,153,189.91	$	$ 7,736,820.09
Rents and Concessions	3,119,206.00	3,097,979.17		21,226.83
Royalties	300,000.00	219,033.98		80,966.02
Total Revenue From Use of Money and Property	$ 21,309,216.00	$ 13,470,203.06	$	$ 7,839,012.94

SCHEDULE 1-C-Continued

COUNTY WIDE FUNDS

INCLUDED IN GENERAL COUNTY LEVY-Continued

STATEMENT OF REVENUE-ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1971

IN DETAIL-Continued

ACCUMULATIVE CAPITAL OUTLAY FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	5,176,479.00	$ 5,180,185.10	$ 3,706.10	$
Property Taxes-Current-Unsecured.	524,438.00	521,799.64		2,638.36
Property Taxes-Prior-Secured.....		5,240.45*		5,240.45
Property Taxes-Prior-Unsecured...		13,599.34	13,599.34	
Total Taxes........................	$ 5,700,917.00	$ 5,710,343.63	$ 9,426.63	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 1,773.48	$ 1,773.48	$
State Aid for Property Tax Relief				
Homeowners......................	199,208.00	200,434.25	1,226.25	
Business Inventory.............	115,720.00	115,720.02	.02	
Total Aid From Other Govermental Agencies..........................	$ 314,928.00	$ 317,927.75	$ 2,999.75	$
Total Accumulative Capital Outlay Fund.......................	$ 6,015,845.00	$ 6,028,271.38	$ 12,426.38	$

CONTAGIOUS DISEASE HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	218,120.00	$ 215,150.46	$	$ 2,969.54
Property Taxes-Current-Unsecured.	26,528.00	26,395.84		132.16
Property Taxes-Prior-Secured.....		272.85*		272.85
Property Taxes-Prior-Unsecured...		935.74	935.74	
Total Taxes........................	$ 244,648.00	$ 242,209.19	$ NET	$ 2,438.81
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 89.70	$ 89.70	$
State Aid for Property Tax Relief				
Homeowners......................	8,274.00	8,322.06	48.06	
Business Inventory.............	5,453.00	5,452.05		.95
Total Aid From Other Governmental Agencies..........................	$ 13,727.00	$ 13,863.81	$ 136.81	$ NET
Total Contagious Disease Hospital Debt Service Fund................	$ 258,375.00	$ 256,073.00	$ NET	$ 2,302.00

SCHEDULE 1-C--Continued

COUNTY WIDE FUNDS

INCLUDED IN GENERAL COUNTY LEVY—Continued

STATEMENT OF REVENUE—ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1971

IN DETAIL--Continued

HARBOR GENERAL HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	870,850.00	$ 877,155.11	$ 6,305.11	$
Property Taxes-Current-Unsecured.	116,314.00	115,738.38		575.62
Property Taxes-Prior-Secured.....		1,537.57*		1,537.57
Property Taxes-Prior-Unsecured...		3,805.35	3,805.35	
Total Taxes........................$	987,164.00	$ 995,161.27	$ 7,997.27	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 393.34	$ 393.34	$
State Aid for Property Tax Relief				
Homeowners......................	33,735.00	33,924.25	189.25	
Business Inventory..............	23,338.00	23,338.33	.33	
Total Aid From Other Governmental Agencies.........................$	57,073.00	$ 57,655.92	$ 582.92	$
Total Harbor General Hospital Debt Service Fund................$	1,044,237.00	$ 1,052,817.19	$ 8,580.19	$

HOSPITAL FACILITIES DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	879,380.00	$ 877,155.11	$	$ 2,224.89
Property Taxes-Current-Unsecured.	114,275.00	113,707.31		567.69
Property Taxes-Prior-Secured.....		1,432.23*		1,432.23
Property Taxes-Prior-Unsecured...		3,805.34	3,805.34	
Total Taxes........................$	993,655.00	$ 993,235.53	$ NET	$ 419.47
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 386.44	$ 386.44	$
State Aid for Property Tax Relief				
Homeowners......................	33,734.00	33,925.35	191.35	
Business Inventory..............	23,060.00	23,060.67	.67	
Total Aid From Other Governmental Agencies.........................$	56,794.00	$ 57,372.46	$ 578.46	$
Total Hospital Facilities Debt Service Fund................$	1,050,449.00	$ 1,050,607.99	$ 158.99	$

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY—Continued

STATEMENT OF REVENUE—ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1971

IN DETAIL--Continued

HOSPITAL FACILITIES NO. 2 DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	1,683,682.00	$ 1,688,110.59	$ 4,428.59	$
Property Taxes-Current-Unsecured.	226,508.00	225,386.66		1,121.34
Property Taxes-Prior-Secured.....		2,993.74*		2,993.74
Property Taxes-Prior-Unsecured...		7,485.97	7,485.97	
Total Taxes........................$	1,910,190.00	$ 1,917,989.48	$ 7,799.48	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 765.98	$ 765.98	$
State Aid for Property Tax Relief				
Homeowners.....................	64,924.00	65,286.81	362.81	
Business Inventory.............	45,277.00	45,276.79		.21
Total Aid From Other Governmental Agencies.........................$	110,201.00	$ 111,329.58	$ 1,128.58	$ NET
Total Hospital Facilities No. 2 Debt Service Fund...............$	2,020,391.00	$ 2,029,319.06	$ 8,928.06	$

JUVENILE DETENTION FACILITIES DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	822,095.00	$ 827,505.02	$ 5,410.02	$
Property Taxes-Current-Unsecured.	110,193.00	109,646.99		546.01
Property Taxes-Prior-Secured.....		1,491.33*		1,491.33
Property Taxes-Prior-Unsecured...		3,555.82	3,555.82	
Total Taxes........................$	932,288.00	$ 939,216.50	$ 6,928.50	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 372.63	$ 372.63	$
State Aid for Property Tax Relief				
Homeowners.....................	31,826.00	32,003.74	177.74	
Business Inventory.............	22,080.00	22,080.16	.16	
Total Aid From Other Governmental Agencies.........................$	53,906.00	$ 54,456.53	$ 550.53	$
Total Juvenile Detention Facilities Debt Service Fund...............$	986,194.00	$ 993,673.03	$ 7,479.03	$

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1971

IN DETAIL--Continued

JUVENILE HALL CENTER DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	111,456.00	$ 115,849.78	$ 4,393.78	$
Property Taxes-Current-Unsecured.	20,406.00	20,305.81		100.19
Property Taxes-Prior-Secured.....		401.11*		401.11
Property Taxes-Prior-Unsecured...		623.85	623.85	
Total Taxes.........................$	131,862.00	$ 136,378.33	$ 4,516.33	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 69.00	$ 69.00	$
State Aid for Property Tax Relief				
Homeowners.....................	4,456.00	4,477.73	21.73	
Business Inventory.............	3,769.00	3,768.70		.30
Total Aid From Other Governmental Agencies.........................	8,225.00	8,315.43	90.43	NET
Total Juvenile Hall Center Debt Service Fund...............$	140,087.00	$ 144,693.76	$ 4,606.76	$

JUVENILE HALL CENTER NO. 2 DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	94,518.00	$ 99,299.63	$ 4,781.63	$
Property Taxes-Current-Unsecured.	12,244.00	12,183.19		60.81
Property Taxes-Prior-Secured.....		156.66*		156.66
Property Taxes-Prior-Unsecured...		374.28	374.28	
Total Taxes.........................$	106,762.00	$ 111,700.44	$ 4,938.44	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 41.40	$ 41.40	$
State Aid for Property Tax Relief				
Homeowners.....................	3,819.00	3,840.91	21.91	
Business Inventory.............	2,516.00	2,516.32	.32	
Total Aid From Other Governmental Agencies.........................$	6,335.00	$ 6,398.63	$ 63.63	$
Total Juvenile Hall Center No. 2 Debt Service Fund...............$	113,097.00	$ 118,099.07	$ 5,002.07	$

COUNTY WIDE FUNDS

SCHEDULE 1-C—Continued

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1971

IN DETAIL--Continued

OSTEOPATHIC HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	410,068.00	$ 397,201.71	$	$ 12,866.29
Property Taxes-Current-Unsecured.	57,137.00	56,854.96		282.04
Property Taxes-Prior-Secured.....		849.63*		849.63
Property Taxes-Prior-Unsecured...		1,871.46	1,871.46	
Total Taxes.........................$	467,20[?].00	$ 455,076.50	$ NET	$ 12,126.50
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 193.22	$ 193.22	$
State Aid for Property Tax Relief				
Homeowners.....................	15,277.00	15,359.44	82.44	
Business Inventory.............	11,176.00	11,176.00		
Total Aid From Other Governmental Agencies.........................$	26,45[?].00	$ [illegible]	$ [illegible]	$
Total Osteopathic Hospital Debt Service Fund................$	[illegible]	$ [illegible]	$ NET	$ 11,850.84

TUBERCULAR SEGREGATION HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	135,634.00	$ 132,399.95	$	$ 3,234.05
Property Taxes-Current-Unsecured.	18,366.00	18,274.29		91.71
Property Taxes-Prior-Secured.....		249.15*		249.15
Property Taxes-Prior-Unsecured...		623.85	623.85	
Total Taxes.........................$	154,000.00	$ 151,048.9[?]	$ NET	$ 2,951.06
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 62.10	$ 62.10	$
State Aid for Property Tax Relief				
Homeowners.....................	5,092.00	5,120.12	28.12	
Business Inventory.............	3,[?]33.00	3,632.76		.24
Total Aid From Other Governmental Agencies.........................$	8,725.00	$ 8,814.9[?]	$ 89.[?]	$ NET
Total Tubercular Segregation Hospital Debt Service Fund................$	162,725.00	$ 159,86[?].92	$ NET	$ 2,86[?].08

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY—Continued

STATEMENT OF REVENUE—ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1971

IN DETAIL--Continued

WAYSIDE HONOR RANCHO DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...	$ 66,935.00	$ 66,199.43	$	$ 735.57
Property Taxes-Current-Unsecured.	10,204.00	10,153.24		50.76
Property Taxes-Prior-Secured.....		175.86*		175.86
Property Taxes-Prior-Unsecured...		311.90	311.90	
Total Taxes........................	$ 77,139.00	$ 76,488.71	$ NET	$ 650.29
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........	$	$ 34.50	$ 34.50	$
State Aid for Property Tax Relief				
Homeowners......................	2,546.00	2,559.46	13.46	
Business Inventory.............	1,955.00	1,955.19	.19	
Total Aid From Other Governmental Agencies..........................	$ 4,501.00	$ 4,549.15	$ 48.15	$
Total Wayside Honor Rancho Debt Service Fund................	$ 81,640.00	$ 81,037.86	$ NET	$ 602.14

WOMEN'S DETENTION FACILITIES DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...	$ 331,128.00	$ 331,001.34	$	$ 126.66
Property Taxes-Current-Unsecured.	48,974.00	48,733.79		240.21
Property Taxes-Prior-Secured.....		810.62*		810.62
Property Taxes-Prior-Unsecured...		1,497.12	1,497.12	
Total Taxes........................	$ 380,102.00	$ 380,421.63	$ 319.63	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........	$	$ 165.61	$ 165.61	$
State Aid for Property Tax Relief				
Homeowners......................	12,731.00	12,798.78	67.78	
Business Inventory.............	9,499.00	9,498.43		.57
Total Aid From Other Governmental Agencies..........................	$ 22,230.00	$ 22,462.82	$ 232.82	$ NET
Total Women's Detention Facilities Debt Service Fund................	$ 402,332.00	$ 402,884.45	$ 552.45	$

*Indicates red figures

Appendix D (continued)

Extracts From Annual Report of Financial Transactions Concerning Counties of California, Fiscal Year 1970-1971

(see opposite) ☞

TABLE 3. COUNTIES--FISCAL YEAR 1970-71--CONTINUED

SUMMARY OF GENERAL COUNTY EXPENDITURES BY FUNCTIONS AND ACTIVITIES FOR FISCAL YEAR ENDED JUNE 30, 1971

COUNTIES	PUBLIC PROTECTION FUNCTION--CONTINUED					ROADS FUNCTION	HEALTH AND SANITATION FUNCTION
	FIRE PROTECTION	FLOOD CONTROL AND SOIL & WATER CONSERVATION	PROTECTIVE INSPECTION	OTHER PROTECTION	TOTAL	ROAD CONSTRUCTION AND MAINTENANCE	HEALTH
ALAMEDA	------------	------------	$740,872	$1,751,922	$29,775,674	$8,119,623	$6,193,057
ALPINE	$10,042	------------	2,591	5,666	114,177	210,932	5,868
AMADOR	12,527	$26,836	98,999	86,820	554,725	594,158	90,853
BUTTE	498,681	6,469	402,082	261,435	3,610,042	3,414,488	874,947
CALAVERAS	53,678	------------	167,361	76,702	900,886	886,638	75,608
COLUSA	------------	9,210	82,072	60,774	626,368	1,556,842	126,168
CONTRA COSTA	------------	334,370	1,093,990	1,934,345	20,718,001	8,831,762	3,261,712
DEL NORTE	------------	------------	53,345	60,038	722,804	674,825	44,000
EL DORADO	------------	------------	129,887	304,438	2,063,775	2,044,899	473,710
FRESNO	------------	------------	1,113,451	938,341	11,860,332	7,611,932	4,534,922
GLENN	------------	11,621	176,242	105,961	774,131	967,182	23,110
HUMBOLDT	------------	41,218	296,129	430,407	3,851,790	2,952,599	1,119,851
IMPERIAL	218,796	------------	528,341	83,547	2,994,739	2,249,272	473,117
INYO	------------	------------	40,311	40,370	688,862	851,183	258,764
KERN	7,258,246	190,722	1,018,432	777,063	19,820,866	7,390,243	2,806,573
KINGS	519,307	------------	187,414	177,187	2,299,380	1,771,226	719,455
LAKE	------------	------------	102,981	83,991	987,023	1,041,899	96,338
LASSEN	------------	713	56,436	112,940	575,085	1,201,869	58,363
LOS ANGELES	17,728,941	------------	2,462,799	10,259,574	241,135,009	70,915,134	66,470,481
MADERA	202,540	4,500	136,381	180,204	1,691,147	1,623,395	441,561
MARIN	669,596	------------	284,978	1,083,279	8,574,380	2,047,960	2,780,221
MARIPOSA	5,250	15,926	4,830	31,351	276,019	659,083	30,617
MENDOCINO	------------	10,977	147,370	193,789	2,109,771	1,863,513	353,038
MERCED	841,317	30,773	351,668	337,287	3,681,968	2,294,323	1,124,879
MODOC	1,463	34,279	33,348	44,665	349,433	898,023	35,020
MONO	------------	1,496	23,963	124,176	509,097	731,074	50,558
MONTEREY	88,858	13,401	741,011	538,967	7,178,493	4,579,554	1,692,538
NAPA	318,809	------------	220,453	309,545	2,684,730	1,346,859	587,872
NEVADA	------------	7,575	106,315	190,981	1,191,401	1,373,450	33,553
ORANGE	2,126,345	155,873	2,160,453	3,122,186	40,252,504	14,395,008	4,215,266
PLACER	128,620	------------	217,912	305,835	2,753,782	2,317,688	370,861
PLUMAS	------------	823	32,349	127,700	728,797	1,401,017	187,705
RIVERSIDE	1,479,970	------------	1,479,630	1,479,804	19,952,929	6,734,447	2,681,994
SACRAMENTO	------------	169,406	1,009,664	1,272,545	19,422,767	10,025,752	2,258,575
SAN BENITO	36,798	78	91,239	43,752	652,765	542,709	139,050
SAN BERNARDINO	534,385	------------	1,267,562	1,513,508	22,101,742	9,725,358	3,043,221
SAN DIEGO	299,517	------------	1,972,779	3,131,346	39,362,284	10,307,217	11,327,035
SAN FRANCISCO	------------	------------	------------	------------	------------	------------	------------
SAN JOAQUIN	127,024	111,457	937,937	516,434	10,305,120	6,429,674	1,681,041
SAN LUIS OBISPO	127,412	8,281	274,615	458,233	3,608,184	2,200,218	739,807
SAN MATEO	207,433	43,655	558,037	2,518,510	20,520,360	4,447,956	8,384,729
SANTA BARBARA	1,978,371	------------	763,390	834,872	12,878,138	4,134,922	2,963,793
SANTA CLARA	330,093	------------	694,824	1,626,544	28,489,326	14,733,870	12,064,711
SANTA CRUZ	83,628	------------	361,134	553,676	4,509,185	2,721,311	1,028,994
SHASTA	53,774	26,628	159,048	266,084	2,263,964	3,660,791	256,821
SIERRA	------------	------------	4,820	51,904	176,354	574,472	25,603
SISKIYOU	------------	2,431	207,981	100,464	1,414,760	2,566,040	278,734
SOLANO	66,979	2,990	238,095	385,971	4,110,208	2,039,668	1,230,076
SONOMA	182,415	------------	389,454	637,808	5,615,795	5,863,748	1,824,200
STANISLAUS	163,970	------------	469,896	258,297	6,187,683	2,977,587	2,299,579
SUTTER	3,452	4,251	202,084	124,798	1,516,275	987,136	936,981
TEHAMA	214,103	------------	143,929	193,107	1,471,997	1,789,110	256,861
TRINITY	------------	3,589	14,460	68,711	399,418	1,559,497	54,804
TULARE	1,289,854	15,299	885,702	440,133	7,189,951	4,581,213	1,891,376
TUOLUMNE	65,989	442	29,700	155,501	1,177,021	1,139,616	157,840
VENTURA	173,238	29,929	1,375,031	1,241,669	15,774,235	5,253,821	3,964,962
YOLO	------------	7,500	415,377	241,414	3,560,078	2,054,816	774,058
YUBA	------------	257	129,661	121,851	1,304,431	885,696	233,098
TOTALS	$38,101,421	$1,322,975	$27,311,015	$42,378,422	$650,020,161	$266,754,298	$160,108,529

TABLE 3. COUNTIES--FISCAL YEAR 1970-71--CONTINUED

SUMMARY OF GENERAL COUNTY EXPENDITURES BY FUNCTIONS AND ACTIVITIES FOR FISCAL YEAR ENDED JUNE 30, 1971

COUNTIES	GENERAL FUNCTION--CONTINUED			PUBLIC PROTECTION FUNCTION			
	PLANT ACQUISITION	PROMOTION	OTHER GENERAL	TOTAL	JUDICIAL	POLICE PROTECTION	DETENTION AND CORRECTION
LAMEDA-------------	$2,871,248	$336,218	$10,745,960	$28,515,540	$8,961,462	$4,922,251	$13,399,167
LPINE--------------	20,155	3,664	34,943	151,832	17,974	73,439	4,465
MADOR--------------	1,031,910	24,609	160,525	1,538,437	126,206	166,483	36,854
UTTE---------------	170,781	51,943	176,886	2,233,511	924,646	1,168,745	347,984
ALAVERAS-----------	7,911	31,231	145,831	691,858	179,032	277,830	146,283
OLUSA--------------	247	15,350	191,195	694,366	147,885	229,925	96,502
ONTRA COSTA--------	1,023,573	112,500	795,731	10,035,472	4,584,995	5,272,329	7,497,972
EL NORTE-----------	185,034	26,315	261,010	894,808	144,499	180,345	284,577
L DORADO-----------	707,297	47,487	1,031,828	3,050,988	474,392	990,103	164,955
RESNO--------------	1,187,863	113,460	6,061,300	12,141,545	2,836,752	3,068,760	3,903,028
LENN---------------	56,991	5,500	188,952	787,891	146,873	245,432	88,002
UMBOLDT------------	170,095	87,925	298,907	2,408,517	1,069,152	1,218,110	796,774
IMPERIAL-----------	766,338	58,622	858,951	3,130,702	685,100	125,536	753,419
INYO---------------	110,328	30,622	366,567	916,876	186,500	264,614	157,067
ERN----------------	1,571,888	86,280	3,622,851	10,260,531	2,922,739	3,509,851	4,143,813
INGS---------------	35,491	24,039	134,816	1,219,211	477,908	454,736	482,828
LAKE---------------	45,081	59,225	401,970	1,250,497	288,015	396,499	115,537
LASSEN-------------	5,210	9,460	137,414	454,545	159,710	174,214	71,072
LOS ANGELES--------	36,833,611	790,601	119,555,418	281,168,695	65,083,705	74,675,450	70,924,540
MADERA-------------	289,482	35,421	164,091	1,479,786	372,448	363,177	431,897
MARIN--------------	1,082,283	108,128	967,760	6,032,224	2,105,337	1,977,533	2,453,657
MARIPOSA-----------	211,555	7,271	114,120	554,643	66,512	104,448	47,702
MENDOCINO----------	123,738	49,890	909,320	2,126,781	637,938	710,363	409,334
MERCED-------------	224,413	71,046	418,536	2,127,206	764,933	591,590	764,400
MODOC--------------	33,798	9,425	192,068	571,351	68,217	95,087	52,374
MONO---------------	482,750	18,504	161,796	970,232	63,965	170,867	124,630
MONTEREY-----------	1,330,106	41,875	1,348,089	5,128,550	1,947,524	1,785,364	2,063,368
NAPA---------------	1,181,032	136,711	601,382	3,103,058	630,146	708,072	497,505
NEVADA-------------	--------------	40,000	324,110	1,071,202	228,140	469,526	188,864
ORANGE-------------	8,142,640	81,687	1,772,741	27,756,009	11,028,205	7,922,589	13,736,853
PLACER-------------	180,396	88,885	1,172,181	2,998,943	625,307	1,051,754	424,354
PLUMAS-------------	80,000	191,058	361,453	1,010,315	147,493	321,281	99,151
RIVERSIDE----------	1,979,757	590,985	1,564,860	11,280,898	4,228,418	5,333,529	5,951,578
SACRAMENTO---------	3,094,366	656,994	5,640,461	18,714,899	4,921,723	5,980,864	6,068,565
SAN BENITO---------	35,148	14,767	178,099	537,714	151,840	151,809	177,249
SAN BERNARDINO------	433,833	172,428	7,853,035	18,160,115	5,166,411	6,725,500	6,894,376
SAN DIEGO----------	379,717	252,086	11,014,466	34,471,863	11,969,117	9,147,809	12,841,716
SAN FRANCISCO------	--------------	--------------	--------------	--------------	--------------	--------------	--------------
SAN JOAQUIN--------	1,364,727	98,134	1,939,228	6,142,918	2,127,737	2,655,881	3,828,650
SAN LUIS OBISPO-----	1,391,144	24,084	995,823	4,344,682	946,615	1,060,370	732,658
SAN MATEO----------	2,465,489	253,899	6,036,411	13,602,970	5,464,977	3,5[illegible]2,173	8,205,575
SANTA BARBARA------	1,875,404	138,094	999,242	8,349,195	2,500,966	3,375,760	3,424,779
SANTA CLARA--------	3,764,455	821,688	5,870,801	24,579,168	8,333,762	9,045,052	8,459,051
SANTA CRUZ---------	217,901	99,516	610,551	3,438,412	1,003,984	1,340,655	1,166,108
SHASTA-------------	173,755	59,638	481,186	1,822,139	505,927	819,620	432,883
SIERRA-------------	--------------	7,400	62,207	194,924	34,551	77,838	7,241
SISKIYOU-----------	155,130	33,580	344,507	1,408,727	418,536	409,198	280,150
SOLANO-------------	491,978	74,689	1,127,052	3,758,557	1,236,366	1,217,318	962,489
SONOMA-------------	2,492,008	212,913	2,184,617	8,307,707	1,268,049	1,403,617	1,734,452
STANISLAUS---------	1,274,965	3,313	97,916	3,401,971	1,620,887	1,765,099	1,909,534
SUTTER-------------	602,696	4,800	175,947	1,498,393	341,074	604,569	236,047
TEHAMA-------------	35,452	12,244	62,255	731,990	251,397	409,272	240,189
TRINITY------------	137,069	9,850	153,342	543,531	106,770	195,999	9,889
TULARE-------------	357,377	36,642	1,368,131	4,246,091	1,364,904	1,938,536	1,255,523
TUOLUMNE-----------	79,388	30,789	146,039	824,684	320,310	403,976	201,103
VENTURA------------	2,255,646	67,250	1,229,057	9,842,415	3,709,612	5,589,923	3,654,833
YOLO---------------	376,233	57,265	165,864	2,359,554	928,129	1,101,081	866,577
YUBA---------------	10,019	7,000	262,687	950,975	258,305	457,639	336,718
TOTALS-----------	$85,606,902	$6,535,000	$204,242,486	$599,990,614	$167,284,077	$179,015,390	$194,606,861

Analysis of Personal Property Tax Attributable to Police Protection, Fire Protection and Road Construction

1970—1971

Personal Property Tax[1]		
Total Revenue[2]		$ 58,882,634
Total Amounts Expended for Police Protection, Fire Protection and Road Construction		1,782,762,696
Police Protection[3]	$ 74,675,450	
Fire Protection[4]	17,728,941	
Road Construction and Maintenance[5]	70,915,134	
	$163,319,525	
Percentage of Total Revenue Attributable to Police Protection, Fire Protection and Road Construction (163,319,525 ÷ 1,782,762,696)		9.161%
Total Revenue Consisting of Personal Property Tax (58,882,634 ÷ 1,782,762,696)		3.303%
Personal Property Tax Attributable to Police Protection, Fire Protection and Road Construction		2.77%

[1] Annual Report of the Board of Supervisors of the County of Los Angeles, Fiscal Year 1970-1971, pp. 29-34 (hereinafter referred to as the "Board of Supervisors Report").

[2] Board of Supervisors Report at p. 26.

[3] Annual Report of Financial Transactions Concerning Counties of California (hereinafter referred to as the "Annual Report"), Fiscal Year 1970-1971, Table 3, p. 5.

[4] Annual Report, Table 3, p. 6.

[5] Annual Report, Table 3, p. 6.

Appendix D (continued)

Extracts From Annual Report of the Board of Supervisors of the County of Los Angeles, Fiscal Year 1971-1972

(see opposite) ☞

COUNTY WIDE FUNDS

SCHEDULE 1-C

INCLUDED IN GENERAL COUNTY LEVY

STATEMENT OF REVENUE-ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

RECAPITULATION

Source	Estimated	Actual	Over Realized	Under Realized
Taxes	$ 865,766,379.00	$ 857,510,904.03	$	$ 8,255,674.97
Licenses and Permits	7,484,762.00	7,347,832.84		136,929.16
Fines, Forfeits and Penalties	6,297,985.00	7,295,953.35	997,968.35	
Revenue From Use of Money and Property	16,038,794.00	16,315,398.83	276,604.83	
Aid From Other Governmental Agencies	1,300,645,982.00	976,378,467.57		324,267,514.43
Charges for Current Services	187,065,698.00	168,357,325.19		18,708,372.81
Other Revenues	54,564,907.00	1,997,146.81		52,567,760.19
TOTAL	$2,437,864,707.00	$2,035,203,028.62	$ NET	$402,661,678.38

IN DETAIL

GENERAL FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured	$ 751,778,061.00	$ 746,303,257.68	$	$ 5,474,803.32
Property Taxes-Current-Unsecured	86,290,810.00	85,025,269.70		1,265,540.30
Property Taxes-Prior-Secured		5,270,742.60*		5,270,742.60
Property Taxes-Prior-Unsecured		2,458,843.17	2,458,843.17	
Penalties and Costs on Delinquent Taxes	3,291,000.00	3,074,259.93		216,740.07
Sales and Use Taxes	11,478,619.00	10,989,188.19		489,430.81
Franchises	1,283,300.00	1,241,929.08		41,370.92
Other Taxes	5,549,840.00	6,956,438.44	1,406,598.44	
Total Taxes	$ 859,671,630.00	$ 850,778,443.59	$ NET	$ 8,893,186.41
Licenses and Permits				
Animal Licenses	$ 1,019,000.00	$ 1,263,543.00	$ 244,543.00	$
Business Licenses	3,878,300.00	3,844,505.08		33,794.92
Construction Permits	1,663,200.00	1,933,381.71	270,181.71	
Road Privileges and Permits	9,000.00	17,358.00	8,358.00	
Zoning Permits	202,700.00	137,393.00		65,307.00
Other Licenses and Permits	712,562.00	151,652.05		560,909.95
Total Licences and Permits	$ 7,484,762.00	$ 7,347,832.84	$ NET	$ 136,929.16
Fines, Forfeits and Penalties				
Vehicle Code Fines	$ 2,271,776.00	$ 2,397,894.08	$ 126,118.08	$
Other Court Fines	2,376,855.00	2,775,658.55	398,803.55	
Forfeitures and Penalties	1,649,354.00	2,122,400.72	473,046.72	
Total Fines, Forfeits and Penalties	$ 6,297,985.00	$ 7,295,953.35	$ 997,968.35	$
Revenue From Use of Money and Property				
Interest	$ 12,069,000.00	$ 13,044,655.82	$ 975,655.82	$
Rents and Concessions	3,739,794.00	3,027,434.82		712,359.18
Royalties	230,000.00	243,308.19	13,308.19	
Total Revenue From Use of Money and Property	$ 16,038,794.00	$ 16,315,398.83	$ 276,604.83	$ NET

COUNTY WIDE FUNDS

SCHEDULE 1-C-Continued

INCLUDED IN GENERAL COUNTY LEVY-Continued

STATEMENT OF REVENUE-ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

IN DETAIL-Continued

ACCUMULATIVE CAPITAL OUTLAY FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...	$	$	$	$
Property Taxes-Current-Unsecured.		663,390.49	663,390.49	
Property Taxes-Prior-Secured.....		40,349.66*		40,349.66
Property Taxes-Prior-Unsecured...		21,895.42	21,895.42	
Total Taxes........................	$	$ 644,936.25	$ 644,936.25	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........	$	$	$	$
State Aid for Property Tax Relief				
Homeowners......................	89.00	821.33	732.33	
Business Inventory.............	88,973.00	88,972.52		.48
Total Aid From Other Govermental Agencies..........................	$ 89,062.00	$ 89,793.85	$ 731.85	$ NET
Total Accumulative Capital Outlay Fund......................	$ 89,062.00	$ 734,730.10	$ 645,668.10	$

CONTAGIOUS DISEASE HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...	$	$	$	$
Property Taxes-Current-Unsecured.	27,669.00	27,552.87		116.13
Property Taxes-Prior-Secured.....		1,684.27*		1,684.27
Property Taxes-Prior-Unsecured...		1,107.54	1,107.54	
Total Taxes........................	$ 27,669.00	$ 26,976.14	$ NET	$ 692.86
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........	$	$	$	$
State Aid for Property Tax Relief				
Homeowners......................	4.00	34.10	30.10	
Business Inventory.............	3,695.00	3,695.32	.32	
Total Aid From Other Governmental Agencies..........................	$ 3,699.00	$ 3,729.42	$ 30.42	$
Total Contagious Disease Hospital Debt Service Fund................	$ 31,368.00	$ 30,705.56	$ NET	$ 662.44

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

IN DETAIL--Continued

HARBOR GENERAL HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	840,437.00	$ 853,871.60	$ 13,434.60	$
Property Taxes-Current-Unsecured.	112,807.00	112,314.84		492.16
Property Taxes-Prior-Secured.....		6,879.00*		6,879.00
Property Taxes-Prior-Unsecured...		4,856.18	4,856.18	
Total Taxes......................$	953,244.00	$ 964,163.62	$ 10,919.62	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 374.13	$ 374.13	$
State Aid for Property Tax Relief				
Homeowners.....................	31,502.00	31,625.78	123.78	
Business Inventory............	22,622.00	22,621.50		.50
Total Aid From Other Governmental Agencies........................$	54,124.00	$ 54,621.41	$ 497.41	$ NET
Total Harbor General Hospital Debt Service Fund...............$	1,007,368.00	$ 1,018,785.03	$ 11,417.03	$

HOSPITAL FACILITIES DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	850,292.00	$ 853,871.60	$ 3,579.60	$
Property Taxes-Current-Unsecured.	112,807.00	112,314.86		492.14
Property Taxes-Prior-Secured.....		6,875.98*		6,875.98
Property Taxes-Prior-Unsecured...		4,770.98	4,770.98	
Total Taxes......................$	963,099.00	$ 964,081.46	$ 982.46	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 374.13	$ 374.13	$
State Aid for Property Tax Relief				
Homeowners.....................	31,502.00	31,625.78	123.78	
Business Inventory............	22,622.00	22,621.50		.50
Total Aid From Other Governmental Agencies........................$	54,124.00	$ 54,621.41	$ 497.41	$ NET
Total Hospital Facilities Debt Service Fund...............$	1,017,223.00	$ 1,018,702.87	$ 1,479.87	$

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

IN DETAIL--Continued

HOSPITAL FACILITIES NO. 2 DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...	$ 1,673,322.00	$ 1,673,589.14	$ 267.14	$
Property Taxes-Current-Unsecured.	217,100.00	216,152.69		947.31
Property Taxes-Prior-Secured.....		13,243.62*		13,243.62
Property Taxes-Prior-Unsecured...		9,456.77	9,456.77	
Total Taxes........................	$ 1,890,422.00	$ 1,885,954.98	$ NET	$ 4,467.02
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........	$	$ 733.30	$ 733.30	$
State Aid for Property Tax Relief				
Homeowners......................	61,743.00	61,981.62	238.62	
Business Inventory.............	43,804.00	43,803.76		.24
Total Aid From Other Governmental Agencies..........................	$ 105,547.00	$ 106,518.68	$ 971.68	$ NET
Total Hospital Facilities No. 2 Debt Service Fund................	$ 1,995,969.00	$ 1,992,473.66	$ NET	$ 3,495.34

JUVENILE DETENTION FACILITIES DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...	$ 779,062.00	$ 785,561.65	$ 6,499.65	$
Property Taxes-Current-Unsecured.	106,422.00	106,264.82		157.18
Property Taxes-Prior-Secured.....		8,915.77*		8,915.77
Property Taxes-Prior-Unsecured...		4,323.04	4,323.04	
Total Taxes........................	$ 885,484.00	$ 887,233.74	$ 1,749.74	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........	$	$ 344.20	$ 344.20	$
State Aid for Property Tax Relief				
Homeowners......................	28,982.00	29,098.95	116.95	
Business Inventory.............	21,164.00	21,164.25	.25	
Total Aid From Other Governmental Agencies..........................	$ 50,146.00	$ 50,607.40	$ 461.40	$ -
Total Juvenile Detention Facilities Debt Service Fund................	$ 935,630.00	$ 937,841.14	$ 2,211.14	$

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

IN DETAIL--Continued

JUVENILE HALL CENTER DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	148,340.00	$ 153,695.94	$ 5,355.94	$
Property Taxes-Current-Unsecured.	14,899.00	14,543.85		355.15
Property Taxes-Prior-Secured.....		982.75*		982.75
Property Taxes-Prior-Unsecured...		826.72	826.72	
Total Taxes.........................$	163,239.00	$ 168,083.76	$ 4,844.76	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 67.34	$ 67.34	$
State Aid for Property Tax Relief				
Homeowners......................	5,669.00	5,685.94	16.94	
Business Inventory.............	3,350.00	3,349.83		.17
Total Aid From Other Governmental Agencies..........................	9,019.00	9,103.11	84.11	NET
Total Juvenile Hall Center Debt Service Fund................$	172,258.00	$ 177,186.87	$ 4,928.87	$

JUVENILE HALL CENTER NO. 2 DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	83,580.00	$ 85,386.23	$ 1,806.23	$
Property Taxes-Current-Unsecured.	12,771.00	12,697.54		73.46
Property Taxes-Prior-Secured.....		1,714.81	1,714.81	
Property Taxes-Prior-Unsecured...		813.92	813.92	
Total Taxes.........................$	96,351.00	$ 100,612.50	$ 4,261.50	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 37.41	$ 37.41	$
State Aid for Property Tax Relief				
Homeowners......................	3,150.00	3,164.37	14.37	
Business Inventory.............	2,461.00	2,461.11	.11	
Total Aid From Other Governmental Agencies.........................$	5,611.00	$ 5,662.89	$ 51.89	$
Total Juvenile Hall Center No. 2 Debt Service Fund................$	101,962.00	$ 106,275.39	$ 4,313.39	$

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

IN DETAIL--Continued

OSTEOPATHIC HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	433,718.00	$ 426,935.50	$	$ 6,782.50
Property Taxes-Current-Unsecured.	51,082.00	50,858.51		223.49
Property Taxes-Prior-Secured.....		3,122.46*		3,122.46
Property Taxes-Prior-Unsecured...		2,385.49	2,385.49	
Total Taxes........................$	484,800.00	$ 477,057.04	$ NET	$ 7,742.96
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 187.06	$ 187.06	$
State Aid for Property Tax Relief				
Homeowners......................	15,750.00	15,806.31	56.31	
Business Inventory.............	10,600.00	10,600.09	.09	
Total Aid From Other Governmental Agencies.........................$	26,350.00	$ 26,593.46	$ 243.46	$
Total Osteopathic Hospital Debt Service Fund................$	511,150.00	$ 503,650.50	$ NET	$ 7,499.50

TUBERCULAR SEGREGATION HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	138,227.00	$ 136,618.66	$	$ 1,608.34
Property Taxes-Current-Unsecured.	17,028.00	16,952.95		75.05
Property Taxes-Prior-Secured.....		1,039.99*		1,039.99
Property Taxes-Prior-Unsecured...		766.76	766.76	
Total Taxes........................$	155,255.00	$ 153,298.38	$ NET	$ 1,956.62
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 59.86	$ 59.86	$
State Aid for Property Tax Relief				
Homeowners......................	5,040.00	5,058.83	18.83	
Business Inventory.............	3,483.00	3,482.97		.03
Total Aid From Other Governmental Agencies.........................$	8,523.00	$ 8,601.66	$ 78.66	$ NET
Total Tubercular Segregation Hospital Debt Service Fund................$	163,778.00	$ 161,900.04	$ NET	$ 1,877.96

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

IN DETAIL--Continued

WAYSIDE HONOR RANCHO DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	74,265.00	$ 68,308.58	$	$ 5,956.42
Property Taxes-Current-Unsecured.	8,514.00	8,476.59		37.41
Property Taxes-Prior-Secured.....		520.96*		520.96
Property Taxes-Prior-Unsecured...		425.98	425.98	
Total Taxes........................$	82,779.00	$ 76,690.19	$ NET	$ 6,008.81
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 29.93	$ 29.93	$
State Aid for Property Tax Relief				
Homeowners.....................	2,520.00	2,529.39	9.39	
Business Inventory.............	1,741.00	1,741.47	.47	
Total Aid From Other Governmental Agencies.........................$	4,261.00	$ 4,300.79	$ 39.79	$
Total Wayside Honor Rancho Debt Service Fund................$	87,040.00	$ 80,990.98	$ NET	$ 6,049.02

WOMEN'S DETENTION FACILITIES DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	350,039.00	$ 341,547.82	$	$ 8,491.18
Property Taxes-Current-Unsecured.	42,568.00	42,382.75		185.25
Property Taxes-Prior-Secured.....		2,602.89*		2,602.89
Property Taxes-Prior-Unsecured...		2,044.70	2,044.70	
Total Taxes........................$	392,607.00	$ 383,372.38	$ NET	$ 9,234.62
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 149.65	$ 149.65	$
State Aid for Property Tax Relief				
Homeowners.....................	12,601.00	12,647.13	46.13	
Business Inventory.............	8,707.00	8,707.48	.48	
Total Aid From Other Governmental Agencies.........................$	21,308.00	$ 21,504.26	$ 196.26	$
Total Women's Detention Facilities Debt Service Fund................$	413,915.00	$ 404,876.64	$ NET	$ 9,038.36

*Indicates red figures

Appendix D (continued)

Extracts From Annual Report of Financial Transactions Concerning Counties of California, Fiscal Year 1971-1972

(see opposite) ☞

TABLE 3. COUNTIES--FISCAL YEAR 1971-72--CONTINUED

SUMMARY OF GENERAL COUNTY EXPENDITURES BY FUNCTIONS AND ACTIVITIES FOR FISCAL YEAR ENDED JUNE 30, 1972

COUNTIES	PUBLIC PROTECTION FUNCTION--CONTINUED					ROADS FUNCTION	HEALTH AND SANITATION FUNCTION
	FIRE PROTECTION	FLOOD CONTROL AND SOIL & WATER CONSERVATION	PROTECTIVE INSPECTION	OTHER PROTECTION	TOTAL	ROAD CONSTRUCTION AND MAINTENANCE	HEALTH
ALAMEDA	----------	----------	$823,742	$1,850,233	$33,283,864	$8,925,729	$6,814,165
ALPINE	$5,550	----------	7,143	8,387	131,248	189,126	6,293
AMADOR	16,631	$26,559	95,525	95,036	635,469	561,454	93,070
BUTTE	608,597	4,929	475,281	280,175	4,104,063	3,185,061	924,940
CALAVERAS	56,368	----------	180,906	83,251	1,049,089	1,163,240	90,749
COLUSA	----------	2,303	84,714	75,344	708,277	1,036,257	173,856
CONTRA COSTA	----------	500,356	1,141,615	2,087,870	22,061,166	8,136,756	3,643,653
DEL NORTE	----------	----------	62,915	57,149	844,076	880,782	53,305
EL DORADO	----------	----------	174,984	386,398	2,809,139	2,129,462	548,925
FRESNO	----------	----------	1,206,144	1,038,517	13,361,732	8,537,141	4,979,595
GLENN	----------	5,883	160,623	126,277	797,412	1,002,728	24,420
HUMBOLDT	----------	62,889	290,417	478,314	4,101,681	4,163,866	1,225,263
IMPERIAL	192,107	----------	525,547	105,909	3,184,808	1,998,427	529,386
INYO	----------	----------	43,213	47,085	766,411	1,087,020	272,238
KERN	7,491,752	110,668	1,172,581	1,001,671	21,433,354	7,163,901	2,566,071
KINGS	539,177	----------	198,702	191,609	2,521,407	1,735,690	1,013,459
LAKE	----------	----------	126,450	75,842	1,200,413	1,018,473	94,333
LASSEN	----------	591	64,835	118,096	742,948	1,121,863	66,127
LOS ANGELES	18,798,450	----------	2,569,713	11,499,257	268,510,970	75,610,404	68,346,709
MADERA	340,293	----------	144,412	171,543	2,011,573	1,660,805	558,546
MARIN	744,860	----------	311,876	1,196,589	10,132,476	2,536,831	3,004,016
MARIPOSA	2,206	5,967	5,048	31,894	336,740	656,045	35,959
MENDOCINO	----------	12,757	152,540	221,251	2,264,300	1,878,412	453,255
MERCED	980,921	38,053	349,725	344,484	4,222,071	2,512,196	1,160,847
MODOC	1,394	2,339	58,276	47,198	348,547	857,908	41,009
MONO	----------	1,628	31,954	193,369	625,472	576,083	63,741
MONTEREY	88,024	13,779	818,241	596,046	7,831,470	4,809,996	1,971,307
NAPA	367,759	----------	239,034	346,944	2,972,624	1,627,462	654,151
NEVADA	----------	5,721	113,524	222,782	1,319,101	1,120,755	42,039
ORANGE	2,769,289	193,156	2,318,047	3,195,405	45,837,054	8,952,038	4,523,705
PLACER	158,364	----------	236,032	285,133	3,118,549	2,236,312	428,629
PLUMAS	----------	911	40,613	141,790	827,510	1,269,567	174,022
RIVERSIDE	2,031,548	----------	1,477,705	1,540,842	22,009,993	7,060,714	3,952,984
SACRAMENTO	----------	306,043	1,176,743	1,430,792	22,976,437	8,897,863	2,649,723
SAN BENITO	32,950	----------	104,690	49,306	718,157	454,349	142,820
SAN BERNARDINO	208,858	----------	1,350,885	1,713,731	24,590,229	9,733,982	3,469,800
SAN DIEGO	26,924	----------	2,338,795	4,363,974	44,476,496	12,156,789	10,466,372
SAN FRANCISCO	----------	----------	----------	----------	----------	----------	----------
SAN JOAQUIN	152,966	120,310	1,049,874	594,521	11,785,519	7,492,147	1,914,468
SAN LUIS OBISPO	147,394	7,800	408,401	442,023	4,058,643	2,203,764	815,950
SAN MATEO	270,143	6,509	667,403	2,529,309	23,629,055	6,027,669	9,142,596
SANTA BARBARA	2,244,344	----------	796,830	816,376	14,293,465	3,594,201	3,420,476
SANTA CLARA	350,720	----------	752,258	1,667,851	34,477,873	10,461,054	13,969,758
SANTA CRUZ	56,085	----------	374,914	655,992	5,041,477	1,910,790	1,151,645
SHASTA	55,925	27,754	168,905	273,619	2,501,782	3,541,981	312,220
SIERRA	----------	----------	6,182	22,122	204,126	615,802	21,453
SISKIYOU	----------	----------	205,541	149,547	1,615,577	2,421,051	274,474
SOLANO	60,600	6,880	251,465	414,865	4,849,823	2,578,108	1,288,591
SONOMA	178,577	----------	438,912	971,726	6,855,419	5,678,377	2,599,917
STANISLAUS	169,671	----------	485,811	217,156	6,820,170	2,987,673	2,190,526
SUTTER	4,195	5,467	240,872	173,495	1,730,757	860,327	1,152,658
TEHAMA	236,943	----------	151,486	217,925	1,582,644	1,592,271	241,341
TRINITY	----------	5,060	11,833	68,762	434,105	1,426,590	81,075
TULARE	1,423,924	193	988,616	956,273	8,171,613	4,849,814	2,306,993
TUOLUMNE	61,827	128	74,968	132,871	1,270,578	1,135,194	193,879
VENTURA	9,301	19,208	1,396,751	1,393,334	17,435,468	5,130,383	4,777,964
YOLO	----------	7,900	429,444	267,221	3,926,575	1,882,680	933,590
YUBA	----------	8	133,059	87,956	1,375,466	976,133	273,263
TOTALS	$40,884,637	$1,501,749	$29,706,715	$47,312,437	$730,926,461	$266,011,496	$172,322,319

TABLE 3. COUNTIES--FISCAL YEAR 1971-72--CONTINUED

SUMMARY OF GENERAL COUNTY EXPENDITURES BY FUNCTIONS AND ACTIVITIES FOR FISCAL YEAR ENDED JUNE 30, 1972

GENERAL FUNCTION--CONTINUED | PUBLIC PROTECTION FUNCTION

COUNTIES	PLANT ACQUISITION	PROMOTION	OTHER GENERAL	TOTAL	JUDICIAL	POLICE PROTECTION	DETENTION AND CORRECTION
AMEDA----------	$2,575,015	$298,045	$21,098,246	$38,983,358	$10,852,918	$5,416,910	$14,340,061
PINE----------	8,936	2,827	38,430	142,370	21,028	85,510	3,630
ADOR----------	468,160	17,967	166,384	996,424	151,700	211,833	38,185
TTE----------	152,165	47,314	568,872	2,714,743	1,025,535	1,335,695	373,851
LAVERAS----------	12,008	31,821	138,008	745,501	219,069	319,095	190,400
LUSA----------	4,584	12,953	206,194	735,718	175,505	255,927	114,484
NIRA COSTA----------	1,204,662	110,000	875,982	11,034,606	5,309,578	5,476,122	7,545,625
L NORTE----------	55,852	25,700	272,581	829,575	144,637	206,475	372,900
DORADO----------	434,609	19,200	349,061	2,467,344	610,829	1,388,027	248,901
ESNO----------	581,623	106,530	5,227,334	10,828,310	3,293,421	3,451,217	4,372,433
ENN----------	91,874	5,500	199,289	847,797	161,796	252,406	90,427
IMBOLDT----------	241,504	89,062	292,501	2,528,233	1,119,501	1,298,077	852,483
IPERIAL----------	269,518	51,218	897,858	2,746,125	756,663	783,355	821,227
IYO----------	71,275	16,793	418,751	929,799	198,785	284,826	192,502
RN----------	2,639,530	89,999	3,888,983	11,909,851	3,122,580	4,093,912	4,440,190
NGS----------	39,640	24,408	143,056	1,256,237	554,562	497,912	539,445
IKE----------	202,065	68,009	392,279	1,485,026	342,623	527,915	127,583
ISSEN----------	24,200	7,319	152,726	525,127	294,794	173,078	91,554
3S ANGELES----------	25,496,884	714,411	126,843,427	296,760,796	73,388,522	85,417,372	76,837,656
ADERA----------	31,160	32,056	126,240	1,158,914	443,592	438,702	473,031
ARIN----------	1,673,044	114,705	1,200,532	7,185,264	2,561,383	2,374,073	2,943,695
ARIPOSA----------	29,233	7,139	129,262	404,372	83,555	152,740	55,330
ENDOCINO----------	63,402	64,575	1,059,066	2,385,042	657,703	784,587	435,462
ERCED----------	131,043	93,623	439,882	2,226,640	868,253	727,516	913,119
DOOC----------	77,564	9,100	204,517	702,886	71,960	110,714	56,666
DNO----------	165,628	32,693	198,087	781,965	64,287	182,996	151,238
ONTEREY----------	612,231	23,063	1,630,027	4,922,612	2,148,749	1,925,858	2,240,773
APA----------	370,636	152,894	598,410	2,359,819	862,120	761,693	595,074
EVADA----------	10,000	412	374,567	1,090,575	273,912	512,033	191,129
RANGE----------	2,948,925	46,444	2,115,713	23,763,926	12,712,722	9,279,814	15,368,621
LACER----------	276,219	90,676	1,402,032	3,552,115	709,831	1,202,297	526,892
LUMAS----------	225,268	190,312	366,959	1,187,726	163,366	368,899	111,931
IVERSIDE----------	2,447,024	616,827	1,590,667	12,760,184	4,647,841	5,915,295	6,396,762
ACRAMENTO----------	2,307,471	174,615	7,303,651	21,288,163	5,789,386	7,309,730	6,963,743
AN BENITO----------	57,929	15,190	156,742	554,504	159,657	180,247	191,307
AN BERNARDINO----------	2,828,417	183,212	8,548,560	22,289,702	5,864,892	7,569,317	7,882,546
AN DIEGO----------	1,382,179	264,531	18,784,943	44,267,106	13,128,239	10,694,691	13,923,673
AN FRANCISCO----------	----------	----------	----------	----------	----------	----------	----------
AN JOAQUIN----------	992,612	111,392	2,316,994	6,798,795	2,620,523	3,224,058	4,023,267
AN LUIS OBISPO----------	687,009	13,050	1,053,834	4,067,553	1,005,448	1,193,268	854,309
AN MATEO----------	4,105,451	305,648	1,458,534	12,202,508	6,498,282	4,324,484	9,332,925
SANTA BARBARA----------	963,615	142,099	1,475,804	8,143,362	2,693,211	3,933,068	3,809,636
SANTA CLARA----------	3,122,823	762,285	3,628,902	23,467,009	10,166,004	12,250,580	9,290,460
SANTA CRUZ----------	163,858	69,640	572,566	3,237,764	1,243,269	1,479,544	1,231,673
SHASTA----------	----------	61,938	595,953	1,770,092	534,385	982,879	458,315
SIERRA----------	----------	5,900	73,004	224,744	57,186	109,082	9,554
SISKIYOU----------	103,201	34,503	232,500	1,332,143	443,886	503,508	313,095
SOLANO----------	159,930	79,726	1,344,524	3,762,786	1,419,689	1,558,796	1,137,528
SONOMA----------	2,702,761	226,033	2,293,392	8,738,258	1,448,192	1,808,095	2,009,917
STANISLAUS----------	1,085,174	2,494	116,243	3,351,918	1,971,950	1,925,619	2,049,963
SUTTER----------	296,893	6,500	179,639	1,281,639	457,143	583,551	266,034
TEHAMA----------	86,899	11,647	70,857	841,686	275,532	433,829	266,929
TRINITY----------	117,637	15,024	181,637	581,236	116,590	222,003	9,857
TULARE----------	292,186	37,694	1,748,440	4,876,488	1,506,598	2,316,185	1,379,824
TUOLUMNE----------	179,434	26,610	145,289	982,605	338,801	452,563	209,420
VENTURA----------	1,945,204	63,250	980,321	10,338,572	4,347,960	5,891,417	4,417,497
YOLO----------	337,572	49,950	213,967	2,457,919	1,089,980	1,217,208	914,822
YUBA----------	10,624	5,500	279,007	986,160	287,579	496,983	369,881
TOTALS----------	$67,564,360	$5,882,026	$227,381,426	$640,791,692	$191,277,702	$206,873,586	$213,369,635

Analysis of Personal Property Tax Attributable to Police Protection, Fire Protection and Road Construction

1971—1972

Personal Property Tax[1]		$ 86,409,172
Total Revenue[2]		2,035,203,028
Total Amounts Expended for Police Protection, Fire Protection and Road Construction		
Police Protection[3]	$ 85,417,372	
Fire Protection[4]	18,798,450	
Road Construction and Maintenance[5]	75,610,404	
	$179,826,226	
Percentage of Total Revenue Attributable to Police Protection, Fire Protection and Road Construction (179,826,226 ÷ 2,035,203,028)		8.836%
Total Revenue Consisting of Personal Property Tax (86,409,172 ÷ 2,035,203,028)		4.246%
Personal Property Tax Attributable to Police Protection, Fire Protection and Road Construction (8.836 ÷ 4.246)		2.08%

[1] Annual Report of the Board of Supervisors of the County of Los Angeles, Fiscal Year 1971-1972, pp. 29-34 (hereinafter referred to as the "Board of Supervisors Report").

[2] Board of Supervisors Report at p. 26.

[3] Annual Report of Financial Transactions Concerning Counties of California (hereinafter referred to as the "Annual Report"), Fiscal Year 1971-1972, Table 3, p. 5.

[4] Annual Report, Table 3, p. 6.

[5] Annual Report, Table 3, p. 6.

Appendix D (continued)

Extracts From Annual Report of the Board of Supervisors of the County of Los Angeles, Fiscal Year 1972-1973

(see opposite) ☞

COUNTY WIDE FUNDS

SCHEDULE 1-C

INCLUDED IN GENERAL COUNTY LEVY

STATEMENT OF REVENUE-ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1973

RECAPITULATION

Source	Estimated	Actual	Over Realized	Under Realized
Taxes	$ 839,202,727.00	$ 837,575,079.64	$	$ 1,627,647.36
Licenses and Permits	8,317,707.00	7,464,949.23		852,757.77
Fines, Forfeits and Penalties	7,051,430.00	7,904,871.02	853,441.02	
Revenue From Use of Money and Property	15,640,604.00	18,311,296.61	2,670,692.61	
Aid From Other Governmental Agencies	1,150,657,083.00	1,004,139,320.81		146,517,762.19
Charges for Current Services	169,214,938.00	143,279,427.10		25,935,510.90
Other Revenues	22,137,359.00	13,055,147.07		9,082,211.93
TOTAL	$2,212,221,848.00	$2,031,730,091.48	$ NET	$180,491,756.52

IN DETAIL

GENERAL FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured	$ 705,022,219.00	$ 701,344,181.20	$	$ 3,678,037.80
Property Taxes-Current-Unsecured	99,871,969.00	97,562,277.33		2,309,691.67
Property Taxes-Prior-Secured		665,202.94	665,202.94	
Property Taxes-Prior-Unsecured		2,176,859.85	2,176,859.85	
Penalties and Costs on Delinquent Taxes	4,250,000.00	3,131,133.70		1,118,866.30
Sales and Use Taxes	11,851,809.00	13,040,604.99	1,188,795.99	
Franchises	1,222,889.00	1,359,694.68	136,805.68	
Other Taxes	4,193,957.00	5,468,274.79	1,274,317.79	
Total Taxes	$ 826,412,843.00	$ 824,748,229.48	$ NET	$ 1,664,613.52
Licenses and Permits				
Animal Licenses	$ 1,290,366.00	$ 1,296,393.00	$ 6,027.00	$
Business Licenses	4,189,170.00	3,612,883.29		576,286.71
Construction Permits	1,700,000.00	2,288,253.18	588,253.18	
Road Privileges and Permits	7,500.00	14,756.13	7,256.13	
Zoning Permits	255,700.00	103,343.63		152,356.37
Other Licenses and Permits	874,971.00	149,320.00		725,651.00
Total Licences and Permits	$ 8,317,707.00	$ 7,464,949.23	$ NET	$ 852,757.77
Fines, Forfeits and Penalties				
Vehicle Code Fines	$ 2,294,300.00	$ 2,563,404.31	$ 269,104.31	$
Other Court Fines	2,786,000.00	2,939,609.33	153,609.33	
Forfeitures and Penalties	1,971,130.00	2,401,857.38	430,727.38	
Total Fines, Forfeits and Penalties	$ 7,051,430.00	$ 7,904,871.02	$ 853,441.02	$
Revenue From Use of Money and Property				
Interest	$ 12,060,619.00	$ 14,996,834.27	$ 2,936,215.27	$
Rents and Concessions	3,370,985.00	3,111,368.12		259,616.88
Royalties	209,000.00	203,094.22		5,905.78
Total Revenue From Use of Money and Property	$ 15,640,604.00	$ 18,311,296.61	$ 2,670,692.61	$ NET

SCHEDULE 1-C-Continued

COUNTY WIDE FUNDS

INCLUDED IN GENERAL COUNTY LEVY-Continued

STATEMENT OF REVENUE-ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1973

IN DETAIL-Continued

ACCUMULATIVE CAPITAL OUTLAY FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured	$ 7,014,918.00	$ 7,015,962.25	$ 1,044.25	$
Property Taxes-Prior-Secured		10,746.70	10,746.70	
Property Taxes-Prior-Unsecured		16,707.75	16,707.75	
Total Taxes	$ 7,014,918.00	$ 7,043,416.70	$ 28,498.70	$
Aid From Other Governmental Agencies				
Other State In-Lieu Tax	$	$ 3,418.66	$ 3,418.66	$
State Aid for Property Tax Relief				
Homeowners	244,080.00	243,846.65		233.35
Business Inventory	63,002.00	66,330.78	3,328.78	
Total Aid From Other Govermental Agencies	$ 307,082.00	$ 313,596.09	$ 6,514.09	$ NET
Total Accumulative Capital Outlay Fund	$ 7,322,000.00	$ 7,357,012.79	$ 35,012.79	$

CONTAGIOUS DISEASE HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Prior-Secured	$	$ 445.62	$ 445.62	$
Property Taxes-Prior-Unsecured		693.92	693.92	
Total Taxes	$	$ 1,139.54	$ 1,139.54	$
Aid From Other Governmental Agencies				
State Aid for Property Tax Relief				
Homeowners	$	$ 9.70*	$	$ 9.70
Business Inventory		138.25	138.25	
Total Aid From Other Governmental Agencies	$	$ 128.55	$ 128.55	$ NET
Total Contagious Disease Hospital Debt Service Fund	$	$ 1,268.09	$ 1,268.09	$

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY—Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1973

IN DETAIL--Continued

HARBOR GENERAL HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured	$ 808,275.00	$ 819,121.70	$ 10,846.70	$
Property Taxes-Current-Unsecured	113,411.00	111,830.53		1,580.47
Property Taxes-Prior-Secured		5,119.42*		5,119.42
Property Taxes-Prior-Unsecured		2,829.10	2,829.10	
Total Taxes	$ 921,686.00	$ 928,661.91	$ 6,975.91	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax	$	$ 399.13	$ 399.13	$
State Aid for Property Tax Relief				
Homeowners	29,024.00	29,119.83	95.83	
Business Inventory	22,463.00	23,029.35	566.35	
Total Aid From Other Governmental Agencies	$ 51,487.00	$ 52,548.31	$ 1,061.31	$
Total Harbor General Hospital Debt Service Fund	$ 973,173.00	$ 981,210.22	$ 8,037.22	$

HOSPITAL FACILITIES DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured	$ 823,067.00	$ 819,121.70	$	$ 3,945.30
Property Taxes-Current-Unsecured	113,411.00	111,830.53		1,580.47
Property Taxes-Prior-Secured		5,119.44*		5,119.44
Property Taxes-Prior-Unsecured		2,829.10	2,829.10	
Total Taxes	$ 936,478.00	$ 928,661.89	$ NET	$ 7,816.11
Aid From Other Governmental Agencies				
Other State In-Lieu Tax	$	$ 399.13	$ 399.13	$
State Aid for Property Tax Relief				
Homeowners	29,024.00	29,119.83	95.83	
Business Inventory	22,463.00	23,029.35	566.35	
Total Aid From Other Governmental Agencies	$ 51,487.00	$ 52,548.31	$ 1,061.31	$
Total Hospital Facilities Debt Service Fund	$ 987,965.00	$ 981,210.20	$ NET	$ 6,754.80

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1973

IN DETAIL--Continued

HOSPITAL FACILITIES NO. 2 DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	1,637,673.00	$ 1,638,244.37	$ 571.37	$
Property Taxes-Current-Unsecured.	222,285.00	219,187.95		3,097.05
Property Taxes-Prior-Secured.....		10,098.21*		10,098.21
Property Taxes-Prior-Unsecured...		5,444.69	5,444.69	
Total Taxes........................$	1,859,958.00	$ 1,852,778.80	$ NET	$ 7,179.20
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 798.26	$ 798.26	$
State Aid for Property Tax Relief				
Homeowners......................	58,026.00	58,216.18	190.18	
Business Inventory.............	44,321.00	45,411.80	1,090.80	
Total Aid From Other Governmental Agencies.........................$	102,347.00	$ 104,426.24	$ 2,079.24	$
Total Hospital Facilities No. 2 Debt Service Fund................$	1,962,305.00	$ 1,957,205.04	$ NET	$ 5,099.96

JUVENILE DETENTION FACILITIES DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	757,240.00	$ 765,700.52	$ 8,460.52	$
Property Taxes-Current-Unsecured.	104,338.00	102,884.05		1,453.95
Property Taxes-Prior-Secured.....		4,667.04*		4,667.04
Property Taxes-Prior-Unsecured...		2,668.96	2,668.96	
Total Taxes........................$	861,578.00	$ 866,586.49	$ 5,008.49	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 373.10	$ 373.10	$
State Aid for Property Tax Relief				
Homeowners......................	27,123.00	27,210.57	87.57	
Business Inventory.............	20,774.00	21,308.92	534.92	
Total Aid From Other Governmental Agencies.........................$	47,897.00	$ 48,892.59	$ 995.59	$
Total Juvenile Detention Facilities Debt Service Fund................$	909,475.00	$ 915,479.08	$ 6,004.08	$

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY—Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1973

IN DETAIL--Continued

JUVENILE HALL CENTER DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Unsecured.$		$ 20,129.39	$ 20,129.39	$
Property Taxes-Prior-Secured.....		1,008.87*		1,008.87
Property Taxes-Prior-Unsecured...		373.65	373.65	
Total Taxes........................$		$ 19,494.17	$ 19,494.17	$ NET
Aid From Other Governmental Agencies				
State Aid for Property Tax Relief				
Homeowners......................$		$ 114.08	$ 114.08	$
Business Inventory.............		2,794.24	2,794.24	
Total Aid From Other Governmental Agencies.........................$		$ 2,908.32	$ 2,908.32	$
Total Juvenile Hall Center Debt Service Fund................$		$ 22,402.49	$ 22,402.49	$

JUVENILE HALL CENTER NO. 2 DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	83,420.00	$ 89,033.59	$ 5,613.59	$
Property Taxes-Current-Unsecured.	11,341.00	11,182.94		158.06
Property Taxes-Prior-Secured.....		487.67*		487.67
Property Taxes-Prior-Unsecured...		320.28	320.28	
Total Taxes........................$	94,761.00	$ 100,049.14	$ 5,288.14	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 43.38	$ 43.38	$
State Aid for Property Tax Relief				
Homeowners......................	3,151.00	3,159.21	8.21	
Business Inventory.............	2,311.00	2,374.30	63.30	
Total Aid From Other Governmental Agencies.........................$	5,462.00	$ 5,576.89	$ 114.89	$
Total Juvenile Hall Center No. 2 Debt Service Fund................$	100,223.00	$ 105,676.03	$ 5,403.03	$

SCHEDULE 1-C—Continued

COUNTY WIDE FUNDS

INCLUDED IN GENERAL COUNTY LEVY—Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1973

IN DETAIL--Continued

OSTEOPATHIC HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	416,249.00	$ 409,560.11	$	$ 6,688.89
Property Taxes-Current-Unsecured.	56,706.00	55,915.22		790.78
Property Taxes-Prior-Secured.....		2,645.67*		2,645.67
Property Taxes-Prior-Unsecured...		1,281.10	1,281.10	
Total Taxes.......................$	472,955.00	$ 464,110.76	$ NET	$ 8,844.24
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 199.56	$ 199.56	$
State Aid for Property Tax Relief				
Homeowners.....................	14,511.00	14,561.76	50.76	
Business Inventory..............	11,230.00	11,488.07	258.07	
Total Aid From Other Governmental Agencies........................$	25,741.00	$ 26,249.39	$ 508.39	$
Total Osteopathic Hospital Debt Service Fund................$	498,696.00	$ 490,360.15	$ NET	$ 8,335.85

TUBERCULAR SEGREGATION HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	131,899.00	$ 124,647.78	$	$ 7,251.22
Property Taxes-Current-Unsecured.	18,146.00	17,892.76		253.24
Property Taxes-Prior-Secured.....		835.66*		835.66
Property Taxes-Prior-Unsecured...		427.03	427.03	
Total Taxes.......................$	150,045.00	$ 142,131.91	$ NET	$ 7,913.09
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 60.73	$ 60.73	$
State Aid for Property Tax Relief				
Homeowners.....................	4,420.00	4,436.48	16.48	
Business Inventory..............	3,536.00	3,621.98	85.98	
Total Aid From Other Governmental Agencies........................$	7,956.00	$ 8,119.19	$ 163.19	$
Total Tubercular Segregation Hospital Debt Service Fund................$	158,001.00	$ 150,251.10	$ NET	$ 7,749.90

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1973

IN DETAIL--Continued

WAYSIDE HONOR RANCHO DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	77,401.00	$ 71,226.68	$	$ 6,174.32
Property Taxes-Current-Unsecured.	9,073.00	8,946.28		126.72
Property Taxes-Prior-Secured.....		417.53*		417.53
Property Taxes-Prior-Unsecured...		213.51	213.51	
Total Taxes........................$	86,474.00	$ 79,968.94	$ NET	$ 6,505.06
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 34.70	$ 34.70	$
State Aid for Property Tax Relief				
Homeowners......................	2,520.00	2,527.96	7.96	
Business Inventory.............	1,848.00	1,890.91	42.91	
Total Aid From Other Governmental Agencies..........................$	4,368.00	$ 4,453.57	$ 85.57	$
Total Wayside Honor Rancho Debt Service Fund...............$	90,842.00	$ 84,422.51	$ NET	$ 6,419.49

WOMEN'S DETENTION FACILITIES DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	345,667.00	$ 356,139.07	$ 10,472.07	$
Property Taxes-Current-Unsecured.	45,364.00	44,732.11		631.89
Property Taxes-Prior-Secured.....		2,088.84*		2,088.84
Property Taxes-Prior-Unsecured...		1,067.57	1,067.57	
Total Taxes........................$	391,031.00	$ 399,849.91	$ 8,818.91	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 173.53	$ 173.53	$
State Aid for Property Tax Relief				
Homeowners......................	12,601.00	12,639.99	38.99	
Business Inventory.............	9,241.00	9,454.80	213.80	
Total Aid From Other Governmental Agencies..........................$	21,842.00	$ 22,268.32	$ 426.32	$
Total Women's Detention Facilities Debt Service Fund...............$	412,873.00	$ 422,118.23	$ 9,245.23	$

*Indicates red figure

Appendix D (continued)

Extracts From Annual Report of Financial Transactions Concerning Counties of California, Fiscal Year 1972-1973

(see opposite) ☞

COUNTY WIDE FUNDS

SCHEDULE 1-C

INCLUDED IN GENERAL COUNTY LEVY

STATEMENT OF REVENUE-ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

RECAPITULATION

Source	Estimated	Actual	Over Realized	Under Realized
Taxes	$ 865,766,579.00	$ 857,510,904.03	$	$ 8,255,674.97
Licenses and Permits	7,484,762.00	7,347,832.84		136,929.16
Fines, Forfeits and Penalties	6,297,985.00	7,295,953.35	997,968.35	
Revenue From Use of Money and Property	16,038,794.00	16,315,398.83	276,604.83	
Aid From Other Governmental Agencies	1,300,645,982.00	976,378,467.57		324,267,514.43
Charges for Current Services	187,065,698.00	168,357,325.19		18,708,372.81
Other Revenues	54,564,907.00	1,997,146.81		52,567,760.19
TOTAL	$2,437,864,707.00	$2,035,203,028.62	$ NET	$402,661,678.38

IN DETAIL

GENERAL FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured	$ 751,778,061.00	$ 746,303,257.68	$	$ 5,474,803.32
Property Taxes-Current-Unsecured	86,290,810.00	85,025,269.70		1,265,540.30
Property Taxes-Prior-Secured		5,270,742.60*		5,270,742.60
Property Taxes-Prior-Unsecured		2,458,843.17	2,458,843.17	
Penalties and Costs on Delinquent Taxes	3,291,000.00	3,074,259.93		216,740.07
Sales and Use Taxes	11,478,619.00	10,989,188.19		489,430.81
Franchises	1,283,300.00	1,241,929.08		41,370.92
Other Taxes	5,549,840.00	6,956,438.44	1,406,598.44	
Total Taxes	$ 859,671,630.00	$ 850,778,443.59	$ NET	$ 8,893,186.41
Licenses and Permits				
Animal Licenses	$ 1,019,000.00	$ 1,263,543.00	$ 244,543.00	$
Business Licenses	3,878,300.00	3,844,505.08		33,794.92
Construction Permits	1,663,200.00	1,933,381.71	270,181.71	
Road Privileges and Permits	9,000.00	17,358.00	8,358.00	
Zoning Permits	202,700.00	137,393.00		65,307.00
Other Licenses and Permits	712,562.00	151,652.05		560,909.95
Total Licences and Permits	$ 7,484,762.00	$ 7,347,832.84	$ NET	$ 136,929.16
Fines, Forfeits and Penalties				
Vehicle Code Fines	$ 2,271,776.00	$ 2,397,894.08	$ 126,118.08	$
Other Court Fines	2,376,855.00	2,775,658.55	398,803.55	
Forfeitures and Penalties	1,649,354.00	2,122,400.72	473,046.72	
Total Fines, Forfeits and Penalties	$ 6,297,985.00	$ 7,295,953.35	$ 997,968.35	$
Revenue From Use of Money and Property				
Interest	$ 12,069,000.00	$ 13,044,655.82	$ 975,655.82	$
Rents and Concessions	3,739,794.00	3,027,434.82		712,359.18
Royalties	230,000.00	243,308.19	13,308.19	
Total Revenue From Use of Money and Property	$ 16,038,794.00	$ 16,315,398.83	$ 276,604.83	$ NET

COUNTY WIDE FUNDS

SCHEDULE 1-C-Continued

INCLUDED IN GENERAL COUNTY LEVY-Continued

STATEMENT OF REVENUE-ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

IN DETAIL-Continued

ACCUMULATIVE CAPITAL OUTLAY FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$		$	$	$
Property Taxes-Current-Unsecured.		663,390.49	663,390.49	
Property Taxes-Prior-Secured.....		40,349.66*		40,349.66
Property Taxes-Prior-Unsecured...		21,895.42	21,895.42	
Total Taxes........................$		$ 644,936.25	$ 644,936.25	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$	$	$
State Aid for Property Tax Relief				
Homeowners.....................	89.00	821.33	732.33	
Business Inventory.............	88,973.00	88,972.52		.48
Total Aid From Other Govermental Agencies..........................$	89,062.00	$ 89,793.85	$ 731.85	$ NET
Total Accumulative Capital Outlay Fund.......................$	89,062.00	$ 734,730.10	$ 645,668.10	$

CONTAGIOUS DISEASE HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$		$	$	$
Property Taxes-Current-Unsecured.	27,669.00	27,552.87		116.13
Property Taxes-Prior-Secured.....		1,684.27*		1,684.27
Property Taxes-Prior-Unsecured...		1,107.54	1,107.54	
Total Taxes........................$	27,669.00	$ 26,976.14	$ NET	$ 692.86
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$	$	$
State Aid for Property Tax Relief				
Homeowners.....................	4.00	34.10	30.10	
Business Inventory.............	3,695.00	3,695.32	.32	
Total Aid From Other Governmental Agencies..........................$	3,699.00	$ 3,729.42	$ 30.42	$
Total Contagious Disease Hospital Debt Service Fund...............$	31,368.00	$ 30,705.56	$ NET	$ 662.44

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

IN DETAIL--Continued

HARBOR GENERAL HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...	$ 840,437.00	$ 853,871.60	$ 13,434.60	$
Property Taxes-Current-Unsecured.	112,807.00	112,314.84		492.16
Property Taxes-Prior-Secured.....		6,879.00*		6,879.00
Property Taxes-Prior-Unsecured...		4,856.18	4,856.18	
Total Taxes........................	$ 953,244.00	$ 964,163.62	$ 10,919.62	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........	$	$ 374.13	$ 374.13	$
State Aid for Property Tax Relief				
Homeowners......................	31,502.00	31,625.78	123.78	
Business Inventory............	22,622.00	22,621.50		.50
Total Aid From Other Governmental Agencies........................	$ 54,124.00	$ 54,621.41	$ 497.41	$ NET
Total Harbor General Hospital Debt Service Fund...............	$ 1,007,368.00	$ 1,018,785.03	$ 11,417.03	$

HOSPITAL FACILITIES DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...	$ 850,292.00	$ 853,671.60	$ 3,579.60	$
Property Taxes-Current-Unsecured.	112,807.00	112,314.86		492.14
Property Taxes-Prior-Secured.....		6,875.98*		6,875.98
Property Taxes-Prior-Unsecured...		4,770.98	4,770.98	
Total Taxes........................	$ 963,099.00	$ 964,081.46	$ 982.46	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........	$	$ 374.13	$ 374.13	$
State Aid for Property Tax Relief				
Homeowners......................	31,502.00	31,625.78	123.78	
Business Inventory............	22,622.00	22,621.50		.50
Total Aid From Other Governmental Agencies........................	$ 54,124.00	$ 54,621.41	$ 497.41	$ NET
Total Hospital Facilities Debt Service Fund...............	$ 1,017,223.00	$ 1,018,702.87	$ 1,479.87	$

SCHEDULE 1-C--Continued

COUNTY WIDE FUNDS

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

IN DETAIL--Continued

HOSPITAL FACILITIES NO. 2 DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...	$ 1,673,322.00	$ 1,673,589.14	$ 267.14	$
Property Taxes-Current-Unsecured.	217,100.00	216,152.69		947.31
Property Taxes-Prior-Secured.....		13,243.62*		13,243.62
Property Taxes-Prior-Unsecured...		9,456.77	9,456.77	
Total Taxes........................	$ 1,890,422.00	$ 1,885,954.98	$ NET	$ 4,467.02
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........	$	$ 733.30	$ 733.30	$
State Aid for Property Tax Relief				
Homeowners.....................	61,743.00	61,981.62	238.62	
Business Inventory.............	43,804.00	43,803.76		.24
Total Aid From Other Governmental Agencies........................	$ 105,547.00	$ 106,518.68	$ 971.68	$ NET
Total Hospital Facilities No. 2 Debt Service Fund...............	$ 1,995,969.00	$ 1,992,473.66	$ NET	$ 3,495.34

JUVENILE DETENTION FACILITIES DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...	$ 779,062.00	$ 785,561.65	$ 6,499.65	$
Property Taxes-Current-Unsecured.	106,422.00	106,264.82		157.18
Property Taxes-Prior-Secured.....		8,915.77*		8,915.77
Property Taxes-Prior-Unsecured...		4,323.04	4,323.04	
Total Taxes........................	$ 885,484.00	$ 887,233.74	$ 1,749.74	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........	$	$ 344.20	$ 344.20	$
State Aid for Property Tax Relief				
Homeowners.....................	28,982.00	29,098.95	116.95	
Business Inventory.............	21,164.00	21,164.25	.25	
Total Aid From Other Governmental Agencies........................	$ 50,146.00	$ 50,607.40	$ 461.40	$
Total Juvenile Detention Facilities Debt Service Fund...............	$ 935,630.00	$ 937,841.14	$ 2,211.14	$

SCHEDULE 1-C--Continued

COUNTY WIDE FUNDS

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

IN DETAIL--Continued

JUVENILE HALL CENTER DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	148,340.00	$ 153,695.94	$ 5,355.94	$
Property Taxes-Current-Unsecured.	14,899.00	14,543.85		355.15
Property Taxes-Prior-Secured.....		982.75*		982.75
Property Taxes-Prior-Unsecured...		826.72	826.72	
Total Taxes.......................$	163,239.00	$ 168,083.76	$ 4,844.76	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 67.34	$ 67.34	$
State Aid for Property Tax Relief				
Homeowners.....................	5,669.00	5,685.94	16.94	
Business Inventory............	3,350.00	3,349.83		.17
Total Aid From Other Governmental Agencies.........................	9,019.00	9,103.11	84.11	NET
Total Juvenile Hall Center Debt Service Fund...............$	172,258.00	$ 177,186.87	$ 4,928.87	$

JUVENILE HALL CENTER NO. 2 DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	83,580.00	$ 85,386.23	$ 1,806.23	$
Property Taxes-Current-Unsecured.	12,771.00	12,697.54		73.46
Property Taxes-Prior-Secured.....		1,714.81	1,714.81	
Property Taxes-Prior-Unsecured...		813.92	813.92	
Total Taxes.......................$	96,351.00	$ 100,612.50	$ 4,261.50	$ NET
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 37.41	$ 37.41	$
State Aid for Property Tax Relief				
Homeowners.....................	3,150.00	3,164.37	14.37	
Business Inventory............	2,461.00	2,461.11	.11	
Total Aid From Other Governmental Agencies........................$	5,611.00	$ 5,662.89	$ 51.89	$
Total Juvenile Hall Center No. 2 Debt Service Fund...............$	101,962.00	$ 106,275.39	$ 4,313.39	$

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

IN DETAIL--Continued

OSTEOPATHIC HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured	$ 433,718.00	$ 426,935.50	$	$ 6,782.50
Property Taxes-Current-Unsecured	51,082.00	50,858.51		223.49
Property Taxes-Prior-Secured		3,122.46*		3,122.46
Property Taxes-Prior-Unsecured		2,385.49	2,385.49	
Total Taxes	$ 484,800.00	$ 477,057.04	$ NET	$ 7,742.96
Aid From Other Governmental Agencies				
Other State In-Lieu Tax	$	$ 187.06	$ 187.06	$
State Aid for Property Tax Relief				
Homeowners	15,750.00	15,806.31	56.31	
Business Inventory	10,600.00	10,600.09	.09	
Total Aid From Other Governmental Agencies	$ 26,350.00	$ 26,593.46	$ 243.46	$
Total Osteopathic Hospital Debt Service Fund	$ 511,150.00	$ 503,650.50	$ NET	$ 7,499.50

TUBERCULAR SEGREGATION HOSPITAL DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured	$ 138,227.00	$ 136,618.66	$	$ 1,608.34
Property Taxes-Current-Unsecured	17,028.00	16,952.95		75.05
Property Taxes-Prior-Secured		1,039.99*		1,039.99
Property Taxes-Prior-Unsecured		766.76	766.76	
Total Taxes	$ 155,255.00	$ 153,298.38	$ NET	$ 1,956.62
Aid From Other Governmental Agencies				
Other State In-Lieu Tax	$	$ 59.86	$ 59.86	$
State Aid for Property Tax Relief				
Homeowners	5,040.00	5,058.83	18.83	
Business Inventory	3,483.00	3,482.97		.03
Total Aid From Other Governmental Agencies	$ 8,523.00	$ 8,601.66	$ 78.66	$ NET
Total Tubercular Segregation Hospital Debt Service Fund	$ 163,778.00	$ 161,900.04	$ NET	$ 1,877.96

COUNTY WIDE FUNDS

SCHEDULE 1-C--Continued

INCLUDED IN GENERAL COUNTY LEVY--Continued

STATEMENT OF REVENUE--ESTIMATED AND ACTUAL

FISCAL YEAR ENDED JUNE 30, 1972

IN DETAIL--Continued

WAYSIDE HONOR RANCHO DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	74,265.00	$ 68,308.58	$	$ 5,956.42
Property Taxes-Current-Unsecured.	8,514.00	8,476.59		37.41
Property Taxes-Prior-Secured.....		520.96*		520.96
Property Taxes-Prior-Unsecured...		425.98	425.98	
Total Taxes.......................$	82,779.00	$ 76,690.19	$ NET	$ 6,088.81
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 29.93	$ 29.93	$
State Aid for Property Tax Relief				
Homeowners......................	2,520.00	2,529.39	9.39	
Business Inventory.............	1,741.00	1,741.47	.47	
Total Aid From Other Governmental Agencies.......................$	4,261.00	$ 4,300.79	$ 39.79	$
Total Wayside Honor Rancho Debt Service Fund................$	87,040.00	$ 80,990.98	$ NET	$ 6,049.02

WOMEN'S DETENTION FACILITIES DEBT SERVICE FUND

Source	Estimated	Actual	Over Realized	Under Realized
Taxes				
Property Taxes-Current-Secured...$	350,039.00	$ 341,547.82	$	$ 8,491.18
Property Taxes-Current-Unsecured.	42,568.00	42,382.75		185.25
Property Taxes-Prior-Secured.....		2,602.89*		2,602.89
Property Taxes-Prior-Unsecured...		2,044.70	2,044.70	
Total Taxes.......................$	392,607.00	$ 383,372.38	$ NET	$ 9,234.62
Aid From Other Governmental Agencies				
Other State In-Lieu Tax..........$		$ 149.65	$ 149.65	$
State Aid for Property Tax Relief				
Homeowners......................	12,601.00	12,647.13	46.13	
Business Inventory.............	8,707.00	8,707.48	.48	
Total Aid From Other Governmental Agencies.......................$	21,308.00	$ 21,504.26	$ 196.26	$
Total Women's Detention Facilities Debt Service Fund................$	413,915.00	$ 404,876.64	$ NET	$ 9,038.36

*Indicates red figures

Appendix E

OFFICE OF THE SPECIAL REPRESENTATIVE
FOR TRADE NEGOTIATIONS
EXECUTIVE OFFICE OF THE PRESIDENT
Washington
20506

Dec. 19, 1977

Sheldon S. Cohen, Esquire
Cohen and Uretz
1775 K Street, N.W., 4th Floor
Washington, D.C. 20006

Peter L. Briger, Esquire
Briger and Associates
299 Park Avenue
New York, New York 10017

Re: *Japan Lines, Ltd.*, et al. v. *County of Los Angeles*, et al., L.A. 30703; Super Ct. Nos. SO C-25617, SO C-27593, and SO C-30557

Dear Messrs. Cohen and Briger:

The purpose of this letter is to advise you that the Office of the Special Representative for Trade Negotiations is in substantial agreement with the conclusions expressed by you as counsel for the petitioners in your petition for rehearing submitted December 5, 1977. In particular, the Office of the Special Representative for Trade Negotiations considers that the incidence of property taxes by local governmental units of the State of California upon ocean-going containers used actively and exclusively in international commerce may well constitute a non-tariff trade barrier of the type which the Office of the Special Representa-

tive for Trade Negotiations is attempting to convince other countries should be eliminated. This task will be rendered more difficult in the event the California Supreme Court sustains the tax at issue.

In addition, the Office of the Special Representative for Trade Negotiations believes that, unless the Court reverses its decision in the instant proceeding, significant problems may arise on the part of the trading partners of the United States, not only with respect to containers, but also in other areas through retaliation and the imposition of similar types of levies. We believe that a broad and liberal construction should be given to the applicable treaties in order to assure continuation of the same type of treatment of U.S. persons undertaking international commerce, which may, from time to time, touch the shores of the foreign trading partners of the United States.

The Office of the Special Representative for Trade Negotiations were unable to prepare a formal *amicus curie* brief in support of the position of petitioners due to the press of other activities and the time limitations within which to file such a brief. In effect, the conclusion that local governmental units in the United States can subject to property tax objects used exclusively in international trade would be inconsistent with long-standing and accepted conduct and would place the United States out-of-step with its various trading partners. We believe that this could cause serious adverse repercussions for international trade relations. Consequently, we support your petition that the Court reconsider its decision in this matter.

Very truly yours,

/s/ RICHARD R. RIVERS
Richard R. Rivers
General Counsel

Appendix F

Letter From the Government of Japan to the State Department

AIDE-MEMOIRE

March 27, 1978

The State of California has imposed a property tax on containers which are owned by foreign shipping lines and kept at Los Angeles terminals for repair or loading. The problem has thus arisen that containers of Japanese shipowners are doubly taxed by the local governments of Japan and the United States. This tax burden impedes the smooth development of trade between the two countries.

The Japanese Government, being seriously concerned about this situation, requests that the Government of the United States take appropriate actions to terminate the imposition of the California tax and have the tax already paid by the Japanese shipping lines refunded.

In the

Supreme Court of the United States

October Term, 1977

No. 77-1378

Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; Showa Line, Ltd.; and Yamashita-Shinnihon Steamship Co., Ltd.,

Appellants,

v.

County of Los Angeles; City of Los Angeles; and City of Long Beach,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

Peter L. Briger, Esq.
Briger & Associates
299 Park Avenue
New York, New York 10017
(212) 758-4000

Sheldon S. Cohen, Esq.,
Cohen & Uretz
1775 K Street, N.W.
Washington, D.C. 20006
(202) 293-4740

Reed M. Williams, Esq.,
Ronald L. Young, Esq.,
Graham & James
100 Oceangate, Suite 515
Long Beach, Calif. 90802
(213) 435-4435

Counsel for Appellants

Opinion of Court of Appeals

IN THE

COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION THREE

2D CIV. No. 47134

Sup. Ct. Nos. SOC 25617, SOC 27593, SOC 30557

JAPAN LINES, LTD., [sic] et al.,

Plaintiffs and Respondents,

v.

COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,

Defendants and Appellants.

APPEAL from a judgment of the Superior Court of Los Angeles County. Hampton Hutton, *Judge.*
Reversed.

JOHN H. LARSON, County Counsel, JAMES DEXTER CLARK, Deputy County Counsel, *for Defendants and Appellants.*

GRAHAM & JAMES, and REED M. WILLIAMS, *for Plaintiffs and Respondents.*

The sole question presented by this appeal upon an agreed statement from a tax refund judgment is whether appel-

lants, the County and City of Los Angeles, may impose an apportioned ad valorem tax upon cargo shipping containers, taxed in Japan, used here essentially exclusively in foreign commerce and owned and controlled by Japanese taxpayers. These taxpayers are six shipping lines incorporated under the laws of Japan which have their principal places of business and commercial domiciles there.

Facts

The facts as stipulated between the parties disclose that the containers at issue are in constant transit save for repair time and time awaiting new cargo. They are only intermittently physically present within the jurisdictions of appellants for an average stay of less than three weeks. They are used exclusively for the transportation of cargo for hire in foreign commerce. They are either full or empty. The full containers are loaded with cargo inbound from or outbound to foreign ports. The empty containers are moved intrastate within California and interstate from California solely to pick up cargo to be carried in foreign commerce or to return the containers themselves to ports (principally Los Angeles) for placement aboard the taxpayers' outbound vessels. The containers are never used for either intrastate or interstate transportation of cargo except in continuation of international voyages.

The Taxpayers' Contentions

Since the judgment under appeal was rendered, our Supreme Court decided unanimously in the case of *Sea-Land Service, Inc.* v. *County of Alameda*, 12 Cal.3d 772, 775-776, that a California county may tax such containers, under circumstances of use essentially identical to those

before us, where the containers were used mainly in foreign commerce[1] but were owned by a shipping company incorporated and commercially domiciled within this country.

The taxpayers contend that the *Sea-Land* decision is not dispositive of this case because, there, Sea-Land conceded that its containers were subject to local taxation within the United States. Its position was that such taxation must be done exclusively at the home port of its vessels. (*Sea-Land, supra,* at 781, 786.) Here, the home ports of the taxpayers' vessels, which are specifically designed to carry the containers at issue, are in Japan. The taxpayers' vessels are likewise registered there rather than in the United States.

The initial position of the taxpayers on this appeal was that under both the home-port doctrine and the most favored nation provisions of the 1953 Treaty between the United States and Japan their containers are not subject to taxation by any jurisdiction except Japan.[2] In this connection, we note that the containers of the taxpayers are subject to property taxation in Japan and have ac-

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[1] The interstate commerce therein involved was via international waters between California and the east coast of the United States. (*Sea-Land, supra,* at 776.) The court made no distinction between the containers used in foreign commerce and those used in intercoastal commerce.

[2] The taxpayers do not now claim though that their cargo containers have not acquired a taxable situs within California. In any event, the following language, used by our Supreme Court in *Sea-Land, supra,* 12 Cal.3d at 778, would appear to be entirely apposite: "While no specific container may be in the county for a substantial period of time, Sea-Land's containers are physically present in the county on every day of the year. Such habitual presence of containers creates a taxable situs, even though the identical containers are not there every day and even though none of the containers is continuously within the county." (Citations omitted.)

tually been so taxed there. Similar containers similarly used in Japan but owned and controlled by steamship companies domiciled in the United States, have not been so taxed there.

At oral argument counsel for the taxpayers advanced a new ground and an additional factual basis for their position that their containers, notwithstanding the continuous use of the containers in the United States within appellants' jurisdictions, are not subject to property taxation by any government except that of Japan. They there argued that the property taxes at issue constitute indirect tonnage duties prohibited by article I, section 10, clause 3 of the United States Constitution and, in support of one of their initial contentions that these taxes are also prohibited by applicable treaties, called our attention for the first time to the existence of the Supplementary Convention of 1964 (15 U.S.T. 1824) to the 1939 Convention between Sweden and the United States on double taxation. (54 Stat. 1759.)

We could disregard this new matter without any consideration thereof because, without any showing of justification therefor, it was presented after the normal briefing process had been concluded. (See *Lotts* v. *Board of Park Commrs.*, 13 Cal.App.2d 625, 636; *Sinclair* v. *Aquarius Electronics, Inc.*, 42 Cal.App.3d 216, 229.) But in the interest of being as fully informed as reasonably possible on the fundamental tax issue presented, we waived this obvious impropriety in the taxpayers' appellate procedure and asked for and obtained from the parties supplemental briefs on the new matter.

Discussion

1. *The Home-Port Doctrine*

The taxpayers concede that in the field of interstate commerce the home-port doctrine has been superseded by the apportionment doctrine, but they argue that it is still extant in the area of foreign commerce where apportionment cannot be substituted except perhaps by treaty or other agreement. Our Supreme Court in *Scandinavian Airlines System, Inc.* v. *County of Los Angeles*, 56 Cal.2d 11, 15, 17, 33, 36-37 (hereafter *SAS*), applied the home-port doctrine to foreign owned, based, registered and taxed airplanes flying exclusively in foreign commerce and using Los Angeles quite infrequently as their sole United States terminus and thereby struck down the apportioned property taxes upon such planes which appellants had imposed.

In *Sea-Land,* though, our Supreme Court criticized the home-port doctrine at length (12 Cal.3d at 781-788) and labeled it "anachronistic". (*Id.* at 787.) It unanimously adopted the view of the minority in *SAS* that the possibility of international double taxation of instrumentalities of foreign commerce, which these containers admittedly are, was no reason to limit the local power to tax them upon a non-discriminatory apportioned basis provided they had (as they did) a taxable situs here. (*Id.* at 786, 787-788.)

2. *The Tonnage Duty Prohibition*

Article I, section 10, clause 3 of the United States Constitution prohibits the imposition by states (and presumably their subdivisions) of tonnage duties. The taxpayers contend that this prohibition invalidates the local property taxes at issue since they in practical effect are tonnage duties upon the cargo containers.

We disagree. In the recent case of *Michelin Tire Corp. v. Wages* (1976) —— U.S. ——, —— [46 L.Ed.2d 495, 500], the United States Supreme Court held that the assessment by Georgia of a nondiscriminatory ad valorem property tax against imported tires was not within the constitutional prohibition against the laying of any impost or duty on imports. In support of this holding the court pointed out that imposts and duties "are essentially taxes on the commercial privilege of bringing goods into a country," while nondiscriminatory ad valorem property taxes of the kind before us are taxes by which a state apportions the costs of its general services among the beneficiaries thereof (*Michelin, supra,* at 504) and that the words "imposts" and "duties", as used in 1787, clearly meant only "exactions upon imported goods *as imports.*" (Emphasis added.) (*Id.* at 506, 502.) This being so, the taxes at issue may not be regarded as tonnage duties prohibited by article I, section 10, clause 3 of the United States Constitution.[3]

3. *The Treaty Question*

The taxpayers contend that the local taxation at issue violates certain treaty obligations of the United States and is therefore invalid under the supremacy clause of the United States Constitution (art. VI, cl. 2). (*SAS, supra,* 56 Cal.2d 11, 37.) In support of this contention

[3] In *Sea-Land, supra,* 12 Cal.3d at 789, our Supreme Court expressly rejected the contention that the similar cargo containers therein involved were exempted from local property taxation by the immediately preceding clause of the United States Constitution. According to that decision the protection against local taxation afforded by that clause extended only to goods and commodities in the import-export stream and not to the containers which were merely a means of transport suitable for repeated use.

they point out first, that the aforementioned 1953 Treaty between the United States and Japan (4 U.S.T. 2063) contains most favored nation provisions with respect to the ownership and possession of movable property and taxes. (Art. IX, § 2; art. XI, § 3; art. XXII, § 2; 4 U.S.T. 2071, 2072, 2079.) They then note that in the just-mentioned *SAS* case our Supreme Court held that the terms of the previously mentioned 1939 Convention between the United States and Sweden respecting double taxation (54 Stat. 1759) prevented appellants herein from generally taxing Swedish-owned property, including particularly airplanes (56 Cal.2d at 39) and, therefore, the Japanese-owned containers before us are likewise exempt from taxation by appellants pursuant to the just-mentioned most favored nation provisions of the 1953 Treaty between the United States and Japan. The *SAS* court based its holding largely on the provisions of article XIII, subdivision 2 of the Swedish Convention (54 Stat. 1766), applying generally apparently to movable property, but the taxpayers argue that their containers are also exempt from local property taxation by appellants under other provisions of the aforementioned Swedish Convention (arts. IV and XIII, subd. (1)(b) (54 Stat. 1761, 1766) exempting instrumentalities of foreign commerce (i.e., ships and airplanes). Finally, the taxpayers argue that by reason of the modification made in the Swedish Convention by the aforementioned 1964 Supplementary Convention thereto (15 U.S.T. 1825) the local property taxation of appellants at issue is precluded by the provision in the convention prohibiting nonreciprocal taxation.[4]

[4] The Supplementary Convention, among other things, replaced paragraph 7 of its protocol (54 Stat. 1777) with a new paragraph 7, reading as follows:

We reject the foregoing argument totally. We do not think that either the holding of the *SAS* case or the Supplementary Convention (which came into existence after the *SAS* decision) invalidates appellants' nondiscriminatory ad valorem taxation of these containers. The *SAS* holding on its facts prohibits only local taxation of foreign owned, based and registered *airplanes*. (56 Cal.2d at 42.) It does not apply to cargo containers as such. The taxpayers seek to extend this holding nevertheless and the relevant treaty prohibitions as well by describing both the airplanes involved in the *SAS* case and the containers involved here as instrumentalities of commerce. This generic description of ships and airplanes does not appear, in the relevant provisions of the 1939 Convention between Sweden and the United States. Furthermore, the *SAS* court did not view the airplanes there involved as instrumentalities of commerce, but instead as intrumentalities of communication, whose activities in this country were confined to the port of entry. (See 56 Cal.2d at 33.) In any event, so far as the convention with Sweden is concerned, then Justice Traynor pointed out in his dissent in the *SAS* case that, properly interpreted, this treaty does not apply to local property taxation at all. (56 Cal.2d at 47-48.)

The same thing, however, cannot be said with respect to the Supplementary Convention thereto. But in advising ratification by the United States of this convention,

"7. The citizens of one of the contracting States shall not, while resident in the other State, be subject therein to other or more burdensome taxes than are citizens of that other State residing in its territory. The term 'citizens' as used in this paragraph, includes also all legal persons, partnerships, and associations created or organized under the laws in force in the respective contracting State. In this paragraph the word 'taxes' means taxes of every kind or description, whether Federal[,] State, or municipal." (15 U.S.T. 1831-1832.)

the United States Senate did so on the basis of a report from its Foreign Relations Committee, which stated that the replacement paragraph in its protocol (which we quoted in footnote 4) merely restated "for the sake of clarity" the requirement of its predecessor paragraph of nondiscriminatory tax treatment as between citizens and noncitizens (Tax Conventions and Protocols with Luxembourg, the Netherlands, Sweden and Japan, Report of the Senate Foreign Relations Committee, Ex. Report No. 10, 88th Cong., 2d Sess. 1964, p. 65).[5]

Admittedly, the taxation at issue in this case does not violate this requirement.

Disposition

The judgment is reversed.

Certified for Publication

Cobey, *J.*

We concur:

Allport, *Acting P.J.*
Potter, *J.*

[5] In determining the effect of an international agreement as domestic law, a court of the United States is to some extent required to take into account domestic sources in the formation of an international agreement such as committee reports indicative of the meaning that the United States Senate has attached to an international agreement in cases where the agreement, as a matter of internal law, requires the assent of the Senate (Rest. 2d, Foreign Relations Law of the United States (1965) § 151, com. (b)(i) pp. 462-463, compare Traynor, J., dissent, *SAS, supra*, 56 Cal.2d at 48).

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD.;
KAWASAKI KISEN KAISHA, LTD.;
MITSUI O.S.K. LINES, LTD.;
NIPPON YUSEN KAISHA;
SHOWA LINE, LTD.; and
YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

—v.—

COUNTY OF LOS ANGELES;
CITY OF LOS ANGELES; and
CITY OF LONG BEACH,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MOTION OF SEA LAND SERVICE INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* and BRIEF OF SEA LAND SERVICE INC., AS *AMICUS CURIAE*

JAMES W. MCGRATH, ESQ.
Sea Land Service Inc.
4th & Main Street
Winston-Salem, North Carolina 27102
(919) 748-4100

Attorney for *Amicus Curiae*

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD.;
KAWASAKI KISEN KAISHA, LTD.;
MITSUI O.S.K. LINES, LTD.;
NIPPON YUSEN KAISHA;
SHOWA LINE, LTD.; and
YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

—v.—

COUNTY OF LOS ANGELES;
CITY OF LOS ANGELES; and
CITY OF LONG BEACH,

Appellees.

MOTION OF SEA LAND SERVICE INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Sea Land Service Inc. (hereinafter referred to as "Sea Land") hereby respectfully moves for leave to file the attached Brief *Amicus Curiae* in Support of Appellants' Jurisdictional Statement. The consent of the Attorneys for the Appellants was obtained on April 21, 1978. The consent of the Attorney for the Appellees was obtained on April 21, 1978. The Appellants' letter of consent and the Appellees' letter of consent are respectively attached hereto as Exhibits A and B.

Sea Land is a domestic corporation organized and existing under the laws of the State of Delaware. Sea Land

is the owner, lessee and operator of vessels, designed to carry freight by means of ocean containers, which are used in interstate and foreign commerce. The operations of Sea Land extend to more than 130 ports throughout the world. Sea Land maintains container terminals in various locations, including a major container terminal in Bremerhaven, the Federal Republic of Germany. As a domestic shipping company with extensive international operations, the principal concern of Sea Land is the likelihood of retaliation in the event the decision of the Supreme Court of the State of California in the instant case is allowed to stand. Sea Land has decided to file this motion, together with the accompanying Brief *Amicus Curiae,* largely because of certain events (some of which have occurred within the last 10 days) that are likely substantially to increase the risk of retaliation by foreign governments. These events are discussed in the accompanying Brief *Amicus Curiae.* As is noted in this Brief, the concern of Sea Land regarding retaliation is also shared by the United States Department of State.

Because of the serious adverse impact which retaliation could have upon the foreign operations of United States owned shipping companies, the Brief which *Amicus Curiae* is requesting to file will contain a more complete presentation of relevant facts in this respect than that of Appellants and can, therefore, make a significant contribution to the Court's consideration of Appellants' Jurisdictional Statement and the merits of the case.

Respectfully submitted,

James W. McGrath, Esq.
Sea Land Service Inc.
4th & Main Street
Winston-Salem, North Carolina 27102

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

Japan Line, Ltd.;
Kawasaki Kisen Kaisha, Ltd.;
Mitsui O.S.K. Lines, Ltd.;
Nippon Yusen Kaisha;
Showa Line, Ltd.; and
Yamashita-Shinnihon Steamship Co., Ltd.,

Appellants,

—v.—

County of Los Angeles;
City of Los Angeles; and
City of Long Beach,

Appellees.

BRIEF OF SEA LAND SERVICE INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

Question Presented

Whether the imposition of property tax by local governments of the State of California upon foreign-owned containers used exclusively in foreign commerce is in violation of the Constitution of the United States (Article I, Section 10, Clauses 2 and 3; Article I, Section 8, Clause 3; Article VI, Clause 2; and Article II, Section 2, Clause 2) and various treaty obligations of the United States.

Interest of the *Amicus*

The interest of the *Amicus* Sea Land in submitting this Brief arises out of the necessity for maintaining uniformity in international taxation of ocean going shipping containers and preventing the imposition of retaliatory taxes. If the decision of the Supreme Court of the State of California (hereinafter referred to as the "California Supreme Court") is not reversed, Sea Land and similarly situated U.S.-owned shipping companies are likely to be subjected to retaliatory taxes upon the properties used in their shipping activities in various foreign countries.

Argument

The Court should hear this case because it presents important constitutional and treaty questions concerning the local taxation of foreign-owned instrumentalities of international commerce for the following two reasons. First, the decision of the California Supreme Court constitutes an unwarranted erosion of the established "home-port" doctrine, pursuant to which numerous foreign countries exempt U.S.-owned containers from local property taxation. Second, the decision of the California Supreme Court ignores constitutional and treaty restrictions, which limit the right of local governments to impose a property tax on shipping containers owned by foreign persons and used exclusively in international commerce. Unless the decision of the California Supreme Court is reversed, the imposition of property taxes by local governments in the United States on foreign-owned containers is likely to proliferate. Such proliferation will undoubtedly cause foreign jurisdictions, such as the Federal Republic of Germany ("West Germany") to retaliate against U.S. shipping companies, which will cause unnecessary and harmful multiple tax burdens likely to injure trade between nations.

Sea Land is, in particular, concerned about retaliation by West Germany, where Sea Land maintains a major container terminal. Sea Land has been advised that, in the event containers owned by West German shipping companies are subjected to local property taxation in the United States, reciprocal action would be taken with respect to containers owned by United States shipping companies or persons. The concern of Sea Land in this respect is also shared by the United States Department of State, which pursuant to a letter dated April 17, 1978, addressed to the Honorable Jerry Brown, Governor of California, expressed the opinion that certain proposed legislation in the State of California to exempt foreign-owned cargo containers from local property taxation "would also lessen the likelihood of retaliatory taxation measures against U.S. citizens engaged in ocean commerce abroad by foreign governments which do not currently impose a property tax on U.S. containers." A copy of this letter is attached hereto as Exhibit C.

On April 19, 1978, Sea Land was apprised that the Division of Assessment—Taxation of Multnomah County, Oregon, had notified various foreign owned shipping companies that they would be required to file personal property tax returns reflecting, *inter alia,* the number, cost and fair market value of containers located within the County as of January 1, 1978. Sea Land learned that this action was taken as the result of an opinion dated January 31, 1978 of an Assistant Attorney General of the State of Oregon, which opinion re-examined the Oregon personal property tax law in light of the decision of the California Supreme Court in the instant case. A copy of this opinion is attached hereto as Exhibit D.

Sea Land is concerned regarding this development for two reasons. First, this action on the part of the State of

Oregon strongly suggests that, unless the decision of the California Supreme Court in the instant case is reversed, the incidence of such local property taxes upon foreign owned containers is likely to proliferate and prompt retaliatory action by foreign governments. Second, Sea Land understands that at least one shipping company from West Germany utilizes port facilities located in Multnomah County, Oregon, for containerized cargo service and, in view of this new position adopted by the local property tax authorities in Oregon, is likely to be subjected to local property taxation therein. If such taxation occurs, it is virtually certain to precipitate reciprocal property taxation by the Federal Republic of Germany upon containers owned by United States persons.

Sea Land is directly and vitally concerned regarding the adverse effects which are likely to result unless the decision of the California Supreme Court is reversed.

We do not believe that the position expressed by the California Supreme Court takes into account either: (i) the existing law as developed under the Constitution and the various treaties entered into by the United States; and (ii) the adverse consequences to U.S. shipping and other carriers in foreign countries that will be generated if its decision is allowed to stand. In this respect, we speak from extensive, first hand experience. In the multitude of foreign ports which Sea Land maintains container operations, we have never experienced the incidence of local property taxes upon our containers. If foreign owned containers are subjected to local property taxes in the United States, it is virtually certain that local property taxes will be imposed upon United States owned containers upon a reciprocal basis.

The imposition of such taxes will create not only the burden of multiple taxation which may make U.S.-owned

shipping companies less competitive with certain foreign-owned companies, but it will also create a major administrative burden for U.S. shipping companies and air carriers that will seriously impede their operations and international trade. The problem which will be created thereby is likely to be insoluble in the area of foreign trade and commerce. In terms of interstate commerce, problems of multiple taxation can be resolved through the intermediacy of this Court. However, in connection with the problem of multiple property taxation in the area of foreign commerce, there exists no body with jurisdiction to intermediate. Therefore, all governments, other than the United States, have taken steps to assure that foreign-owned containers, temporarily within the country as part of an international voyage, shall be exempted from local taxation.

It is respectfully submitted that, based upon existing precedents under the Constitution and treaty obligations, this Court should conclude that the same rule is applicable under United States law.

Conclusion

For the foregoing reasons, jurisdiction of this should be noted.

Respectfully submitted,

JAMES W. MCGRATH
Sea Land Service Inc.
4th & Main Street
Winston-Salem, North Carolina 27102

Exhibit A

BRIGER & ASSOCIATES
ATTORNEYS-AT-LAW
299 PARK AVENUE
NEW YORK, N. Y. 10017

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(212) PLAZA 8-4000
CABLE ADDRESS BRIGREN
TELEX NO. 237612

PETER L. BRIGER

AYDIN S. CAGINALP
JONATHAN S. KUSKO
MARGARET K. YONKO

U. K. ASSOCIATES
CHRISTOPHER M. BOND*
GRAHAM E. BERRY**

---

*ADMITTED IN UNITED KINGDOM
**ADMITTED IN NEW ZEALAND

LONDON OFFICE
STANBROOK HOUSE
2-5 OLD BOND STREET
LONDON W. IX 3TB, ENGLAND
TELEPHONE (01) 499-4822
CABLE ADDRESS: BRIGER LONDON WI
TELEX NO. 269280

PEMBROKE HOUSE
104 LOWER BAGGOT STREET
DUBLIN 2, IRELAND
TELEPHONE 764674
TELEX NO. 30472 CKRY-EI

FRANCIS T. SWEENEY
OF COUNSEL

April 21, 1978

James W. McGrath, Esq.
Sea Land Service Inc.
4th & Main Street
Winston-Salem, North Carolina 27102

Dear Mr. McGrath:

Reference is made to our telephone discussion on April 21, 1978, concerning the interest of Sea Land Inc. (hereinafter referred to as "Sea Land") to file a Brief *amicus curiae* in support of Appellants' Jurisdictional Statement in *Japan Line, Ltd., et al.* v. *County of Los Angeles, et al.*, Supreme Court of the United States, No. 77-1378.

Exhibit A

We are pleased to inform you that we hereby consent to the filing of a Brief *amicus curiae.*

Sincerely yours,

/s/ PETER L. BRIGER
Peter L. Briger

PLB:rma

Exhibit B

COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL
648 HALL OF ADMINISTRATION
LOS ANGELES, CALIFORNIA 90012

[EMBLEM]

JOHN H. LARSON, COUNTY COUNSEL
DONALD K. BYRNE, CHIEF DEPUTY

April 21, 1978

(213) 974-1833

Mr. James W. McGrath
SEA-LAND SERVICES, INC.
Menlo Park, New Jersey

Re: *Japan Line Limited, et al.* v. *County of Los Angeles; City of Los Angeles; and City of Long Beach;* U.S. Supreme Court Docket No. 77-1378

Dear Mr. McGrath:

This will confirm the substance of our telephone conversation of today to the effect that we have no objections to your filing an Amicus Curiae Brief on behalf of the Ap-

Exhibit B

pellants regarding the acceptance of this case for decision by the Supreme Court.

Very truly yours,

John H. Larson
County Counsel

By /s/ James Dexter Clark
James Dexter Clark
Deputy County Counsel

JDC:lvw

Exhibit C

DEPARTMENT OF STATE
Washington, D.C. 20520

17 April 1978

The Honorable Jerry Brown,
Governor of California, Sacramento

Dear Governor Brown:

I am writing to express support for SB 1756, introduced by Senator Dills, to exempt foreign cargo containers principally used in the transportation of cargo by vessels in ocean commerce, from property taxation for the fiscal year 1979-80 and fiscal years thereafter. The Department of State is pleased to learn of the introduction of this bill and strongly recommends its passage.

Enactment of this bill would extend indefinitely the present exemption of such containers from property taxation. In response to past imposition of local property taxes upon such containers, foreign governments have expressed their concerns that containers owned by their citizens may be subjected to double taxations i.e., taxation both in the home country and in California. For example, the Department recently received an aide-memoir from the Government of Japan complaining that local California property taxes upon foreign containers used in foreign commerce constitute a tax burden which impedes the smooth development of U.S.-Japan trade relations. Enactment of SB 1756 would preclude any renewal of such concerns on the part of foreign governments.

The proposed legislation would also lessen the likelihood of retaliatory taxation measures against U.S. citizens en-

Exhibit C

gaged in ocean commerce abroad by foreign governments which do not currently impose a property tax upon U.S. containers.

We believe the proposed legislation will foster the financial health and well-being of both U.S. and foreign vessels now operating to California. The legislation appears consistent with the principle of taxation based upon reciprocity. We hope it will receive early and favorable consideration.

Sincerely,

/s/ JULIUS L. KATZ
Julius L. Katz
Assistant Secretary for
Economic and Business Affairs

cc: Senator Dills
Senator Marks
Senator Beverly
Senator Nejedly
Senator Rodda
Senator Stull

Assemblyman Cullen
Assemblyman Bane
Assemblyman Bannai
Assemblyman Boatwright
Assemblyman Chel
Assemblyman Imbrecht
Assemblyman Knox
Assemblyman Vincent Thomas

Exhibit D

DEPARTMENT OF JUSTICE
TAX DIVISION
104 State Office Building
Salem, Oregon 97320
Telephone: (803) 376-4494

January 31, 1978

Mr. Lindy Freeman
Division of Assessment & Taxation
Room 136
Multnomah County Courthouse
Portland, Oregon 97204

Re: Personal Property Tax on Cargo Containers

Dear Mr. Freeman:

This opinion is in response to a question presented by your office concerning cargo containers.

QUESTION PRESENTED

Are cargo containers used in interstate and foreign commerce subject to personal property ad valorem tax assessment?

ANSWER GIVEN

Cargo containers continuously present in Multnomah County are not constitutionally immune from an apportioned personal property ad valorem tax. Neither do these cargo containers qualify for exemption under Oregon's freeport law, ORS 307.810.

Exhibit D

Discussion

You have asked whether cargo containers used on container ships in interstate and foreign commerce can be assessed under the personal property ad valorem tax. Taxpayers have claimed that these containers are either immune under the protection of the United States Constitution or are exempt under Oregon's free port law.

To support their position of constitutional immunity, taxpayers have cited a decision by the Superior Court of California. *Japan Line, Ltd.* v. *County of Los Angeles,* 132 Cal Rptr 531 (L.A. County 1973). However, the Supreme Court of California recently reversed this superior court's decision. *Japan Line, Ltd.* v. *County of Los Angeles,* 141 Cal 905 (1977). The California Supreme Court held that an apportioned ad valorem tax on the cargo containers violated neither the Commerce Clause, the Import-Export Clause nor the Supremacy Clause of the United States Constitution. A copy of this recent decision and a copy of an earlier decision in *Sea-Land Service, Inc.* v. *County of Alameda,* 117 Cal2d 448, 528 P2d 56 (1974) are enclosed. Assuming that the cargo containers' presence in Multnomah County are similar to those in the California counties, these two cases clearly indicate that the cargo containers are subject to the ad valorem tax.

The taxpayers also contend that their cargo containers are exempt from ad valorem taxation under the Oregon free port law. However, ORS 307.810 grants an exemption only for

> "Personal property in transit through this state [that] is goods, wares and merchandise destined for sale in the ordinary course of trade or business. . . ."

Exhibit D

The cargo containers are used to transport personal property destined for sale in the ordinary course of the trade or business, but are not, themselves, destined for sale out of state. The Oregon free-port law was not intended to extend to containers used and reused transporting goods.

The two enclosed California decisions clearly hold that cargo containers used in interstate and foreign commerce are not immune under the United States Constitution from an apportioned ad valorem tax. In addition, the Oregon free port law does not extend its exemption protection to the containers. Consequently, the continuous presence of cargo containers in Multnomah County subjects them to an apportioned ad valorem tax.

Sincerely,

/s/ James D. Manary
James D. Manary
Assistant Attorney General

bem

cc: Walt Taylor
Personal Property Assessment

Received
Multnomah County
Feb 02 1978
Bruce G. Lawman
Director, Division of
Assessment & Taxation

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1378

JAPAN LINE, LTD., *et al.*,

Appellants,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Appellees.

On Appeal From the Supreme Court of the State of California.

Filed March 28, 1978.

Jurisdiction Postponed June 12, 1978.

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD., *et al.*,

Appellants,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Appellees.

On Appeal From the Supreme Court of the State of California.

APPENDIX

Chronological List of Relevant Docket Entries.

May 18, 1971—Plaintiffs' Complaint for recovery of taxes for fiscal year 1970-71 filed in the California Superior Court, Los Angeles County (Case No. SOC 25617).

June 14, 1971—Defendants' Answer to said Complaint (Case No. SOC 25617) filed.

February 2, 1972—Plaintiffs' Complaint for recovery of taxes for fiscal year 1971-72 filed in the California Superior Court, Los Angeles County (Case No. SOC 27593).

April 5, 1972—Defendants' Answer to said Complaint (Case No. SOC 27593) filed.

February 15, 1973—Plaintiffs' Complaint for recovery of taxes for fiscal year 1972-73 filed in the California Superior Court, Los Angeles County (Case No. SOC 30557).

March 23, 1973—Defendants' Answer to said Complaint (Case No. SOC 30557) filed.

October 10, 1973—Plaintiffs' Motion to Consolidate the above three actions heard and granted by the Superior Court.

March 14, 1974—Intended Decision in favor of plaintiffs filed following trial in the Superior Court.

October 15, 1974—Findings of Fact and Conclusions of Law and Judgment entered in favor of plaintiffs by the Superior Court.

December 12, 1974—Notice of Appeal filed by defendants in the Superior Court.

September 17, 1975—Agreed Statement in Lieu of Clerk's and Reporter's Transcripts filed by plaintiffs

and defendants in the California Court of Appeal, Second Appellate District, (hereafter, Court of Appeal).

December 22, 1975—Defendants' Opening Brief filed in the Court of Appeal.

March 19, 1976—Plaintiffs' Brief filed in the Court of Appeal.

May 17, 1976—Defendants' Reply Brief filed in the Court of Appeal.

July 16, 1976—Plaintiffs' Supplemental Brief filed in the Court of Appeal.

July 30, 1976—Defendants' Supplemental Brief filed in the Court of Appeal.

August 27, 1976—Opinion of the Court of Appeal filed, reversing the decision of the Superior Court and entering judgment in favor of defendants.

September 13, 1976—Plaintiffs' Petition for Rehearing filed in the Court of Appeal.

September 22, 1976—Plaintiffs' Petition for Rehearing denied by the Court of Appeal.

October 6, 1976—Plaintiffs' Petition for Hearing filed in the California Supreme Court.

October 27, 1976—Defendants' Response to Plaintiffs' Petition for Hearing filed in the California Supreme Court.

November 24, 1976—Plaintiffs' Petition for Hearing granted by the California Supreme Court.

November 18, 1977—Opinion of the California Supreme Court filed, affirming the decision of the Court of Appeal.

December 9, 1977—Plaintiffs' Petition for Rehearing filed in the California Supreme Court.

December 28, 1977—Plaintiffs' Petition for Rehearing denied by, and Order Modifying Opinion filed in, the California Supreme Court.

February 28, 1978—Notice of Appeal by plaintiffs to the United States Supreme Court filed in the California Supreme Court.

Complaint.

Superior Court of the State of California, for the County of Los Angeles.

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD; NIPPON YUSEN KAISHA; SHOWA SHIPPING CO., LTD.; YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., foreign corporations, Plaintiffs, v. COUNTY OF LOS ANGELES AND CITY OF LOS ANGELES, Defendants. NO. SOC 25617.

Original Filed: May 8, 1971.

Plaintiffs allege:

I

Plaintiffs are and at all times hereinafter mentioned were, corporations duly organized and existing under the laws of Japan engaged primarily in the operation of steamships and containerships in the carriage of cargo in foreign commerce.

II

Defendant COUNTY OF LOS ANGELES is, and at all times hereinafter mentioned was, a political subdivision of the State of California.

III

Defendant CITY OF LOS ANGELES is, and at all times hereinafter mentioned was, a municipal corporation and political subdivision of the State of California. At all times mentioned herein, defendant COUNTY OF LOS ANGELES acted in part for defendant CITY OF LOS ANGELES in levying and collecting the taxes which are the subject matter of this complaint.

IV

On March 1, 1970, at 12:01 a.m., plaintiffs were the owners and lessees of certain cargo containers located in the City of Los Angeles. Said containers are an integral part of the movement of goods in foreign commerce by plantiffs' vessels, which are registered under the laws of Japan, where each of plaintiffs has its corporate and commercial domicile and the home port of its vessels and containers. At all times when said containers are physically present in the City of Los Angeles, they are so located only for short periods of time sufficient for the delivery and loading of the international cargo shipments contained therein.

V

The Assessor of the County of Los Angeles assessed against the subject cargo containers, and the Tax Collector of the County of Los Angeles levied taxes thereon as follows:

Plaintiff-Taxpayer	Appraisal	Assessment	Tax Levied
Japan Line	$ 765,000	$191,250	$20,512.32
Kawasaki Kisen Kaisha	1,250,100	312,525	33,519.55
Mitsui O.S.K. Line	1,251,000	312,750	33,543.68
Nippon Yusen Kaisha	1,389,000	347,250	37,243.95
Showa Shipping Co.	595,000	148,750	15,954.03
Yamashita-Shinnihon	824,000	206,000	22,094.32

Between December 28, 1970 and March 2, 1971, plaintiffs herein paid, under written protest, the amount

of tax respectively levied against each of them. The grounds of the protest were set out in an exhibit accompanying the payment of the tax, which grounds are set forth in Exhibit "A" attached hereto and incorporated herein.

VI

At 12:01 a.m., on March 1, 1970, none of the cargo containers physically present within the City of Los Angeles had acquired taxable situs in the County or City of Los Angeles. The subject containers were and are constantly committed to and engaged in the process of importation to and exportation from the United States and are integral to the transportation of goods aboard plaintiffs' vessels exclusively in foreign commerce. As instrumentalities of foreign commerce, and due to their integral participation and exclusive use in foreign commerce and foreign movements of cargo, the containers were subject to taxation exclusively in Japan. Therefore, the said taxes were unlawfully levied and collected in that the subject containers were exempt from taxation by United States Constitution Article I Sections 8, 9 and 10, Amendment V and Amendment XIV; the Treaty of Friendship, Commerce and Navigation between the United States and Japan (especially Article XI and XVII) and, pursuant to the most-favored-nation provisions of that Treaty, (Article VI Section 4 and Article XI Section 3) under treaties with other nations; California Constitution Article 13 Sections 1 and 4; and Revenue and Taxation Code Section 201. The levying and collecting of the subject taxes subjected plaintiffs and the containers to double taxation, as between California and Japan, in violation of Revenue and Taxation Code Section 102. As movable property without a "normal place

of return" between movements, the containers have situs exclusively at plaintiffs' principal place of business, Japan. (See, e.g., 18 California Administrative Code 205).

VII

The subject taxes were unlawfully levied and collected in that the assessment upon which the taxes were based was not made "on discovery" of the presence of the subject containers as required by Revenue and Taxation Code Section 531.

VIII

No refund of said taxes, or any part thereof, has been made to plaintiffs.

WHEREFORE, plaintiffs pray for judgment against defendants in the respective amounts of taxes levied and paid as set forth in Paragraph V of this Complaint, together with interest thereon from the date of payment at the maximum rate of interest, which rate is no less than 8½% per annum from the date of payment, for costs of suit, and for such other and further relief as may be just and proper.

Dated: April 30, 1971.

GRAHAM & JAMES
FRANCIS L. TETREAULT
REED M. WILLIAMS
DONALD H. READ
By /s/ Reed M. Williams
REED M. WILLIAMS
Attorneys for Plaintiffs

EXHIBIT A

1) The subject containers as "movable property" have not acquired situs in Los Angeles County under the standards of Rule 205 of the California Administrative Code, Title 18; and, pursuant to that Rule, have situs only at the principal place of business of the taxpayer, Japan.

2) The subject containers are integral to taxpayer's movement of cargo in foreign commerce.

a) They are instrumentalities of foreign commerce and are taxable only in taxpayer's domicile, Japan, under the "home port" doctrine and under the "commerce clause" of the United States Constitution, Article I, Section 8, Clause 3; Article XIII, Section 1, of the California Constitution; and Revenue and Taxation Code, Section 201, and the due process clauses of the United States Constitution Amendments V and XIV.

b) The containers are constantly engaged in the process of importation to and exportation from the United States, and, as such, are exempt from taxation under the "import-export" and "commerce" clauses [Article 1, §§10 and 8(3)] of the United States Constitution and under Article XIII, Section 1, of the California Constitution, and under Revenue and Taxation Code, Section 201, and the due process clauses, Amendments V and XIV to the United States Constitution.

3) The containers are integral parts of the vessels which transport the cargo and as such are exempt under Article XIII, Section 4, of the California Constitution, and Section 201 of the Revenue and Taxation Code.

4) These containers are exempt from taxation under the Treaty of Friendship, Commerce and Navigation between the United States and Japan and, pursuant to the most-favored-nation provision of that treaty, under treaties with other nations.

5) The presence of these containers in Los Angeles County was well known to the general public and the Assessor during the regular assessment period in 1969 and the escaped assessment is, therefore, void as not made "on discovery" as required by Revenue and Taxation Code Section 531.

DECLARATION

State of California, County of Los Angeles—ss.

I, the undersigned, say:

I am a member of the firm of GRAHAM & JAMES, attorneys for the Plaintiffs herein; said Plaintiffs are corporations, all of whose officers are absent from the County of Los Angeles, California, where said attorneys have their offices, and that I make this verification for and on behalf of said party for that reason; the foregoing document is true of my own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 30, 1970 at Long Beach, California.

/s/ Reed M. Williams
REED M. WILLIAMS

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA SHIPPING CO., LTD.; YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., Plaintiffs, v. COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, Defendants.	CASE NUMBER SOC 25017 CERTIFICATE OF ASSIGNMENT OR TRANSFER

A civil action or proceeding presented for filing in a district other than the Central District must be accompanied by this certificate. An action for personal injury, wrongful death or damage to property presented for filing in the Central District must be accompanied by this certificate. If the ground is the residence of a party, his name and residence shall be stated.

[X] The undersigned declares that the above entitled matter is filed for proceedings in the South District of the Superior Court under Rule 2, Section 3 of this court for the checked reason:

		Nature of Action	Ground
☐	1	Abandonment	Petitioner resides within the district
☐	2	Adoption	Petitioner resides within the district
☐	3	Conservator	Petitioner or conservatee resides within the district
☐	4	Contract	Performance in the district is expressly provided for
☐	5	Equity	The cause of action arose within the district
☐	6	Eminent Domain	The property is located within the district
☐	7	Family Law	Plaintiff, defendant, petitioner or respondent resides within the district
☐	8	Forceable Entry	The property is located within the district
☐	9	Guardianship	Petitioner or ward resides within the district
☐	10	Habeas Corpus	No action pending, the person is held within the district
☐	11	Mandate*	The defendant functions wholly within the district
☐	12	Name Change	The petitioner resides within the district
☐	13	Personal Property	The property is located within the district
☐	14	Probate	Decedent resided or petitioner resides within the district
☐	15	Prohibition*	The defendant functions wholly within the district
☐	16	Review*	The defendant functions wholly within the district
☐	17	Small Claims Appeal	The lower court is located within the district
☐	18	Title to Real Property	The property is located within the district
☐	19	TORT	The cause of action arose within the district
☐	20	TORT*	The cause of action arose outside of this county
☐	21	Transferred Action	The lower court is located within the district
☐	22	Unlawful Detainer	The property is located within the district
	23	Refund of Taxes	The property is located within the district.

The residence of the petitioner, respondent, deceased, conservatee, ward, plaintiff, or defendant Plaintiffs (Name) is San Pedro, Wilmington, Long Beach (Address)

☐ Under Rule 2, Section 6, I allege that for the convenience of witnesses and to promote the ends of justice the matter should be transferred to the South District.

I declare under penalty of perjury that the foregoing is true and correct and this declaration was executed on May 13, 1971 at Long Beach, California.

So Ordered MAY 18 1971

CHARLES C. STRATTON

(Signature of Attorney)

*Prerogative writs concerning a court of inferior jurisdiction and Tort Actions arising outside of the county may be filed in Central District only.

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CERTIFICATE OF ASSIGNMENT OR TRANSFER

Rule 2 LASCR

Recovery of Taxes.

Superior Court of the State of California, for the County of Los Angeles.

Japan Line Ltd.; Mitsui O.S.K. Lines, Ltd.; Kwasaki Kisen Kaisha, Ltd.; Nippon Yusen Kaisha; Showa Shipping Co., Ltd.; Yamashita-Shinnihon Steamship Co., Ltd., foreign corporations, Plaintiffs, v. County of Los Angeles and City of Los Angeles, Defendants. No. SOC 27593.

Original Filed: Feb. 2, 1972.

Plaintiffs allege;

I

Plaintiffs are and at all times hereinafter mentioned were, corporations duly organized and existing under the laws of Japan engaged primarily in the operation of steamships and containerships in the carriage of cargo in foreign commerce.

II

Defendant COUNTY OF LOS ANGELES is, and at all times hereinafter mentioned was, a political subdivision of the State of California.

III

Defendant CITY OF LOS ANGELES is, and at all times hereinafter mentioned was, a municipal corporation and political subdivision of the State of California. At all times mentioned herein, defendant COUNTY OF LOS ANGELES acted in part for defendant CITY OF LOS ANGELES in levying and collecting the taxes which are the subject matter of this complaint.

IV

On March 1, 1971, at 10:01 A.M., plaintiffs were the owners and lessees of certain cargo containers located in the City of Los Angeles. Said containers are an integral part of the movement of goods in foreign commerce by plaintiff's vessels, which are registered under the laws of Japan, where each of plaintiffs has its corporate and commercial domicile and the home port of its vessels and containers. At all times when said containers are physically present in the City of Los Angeles, they are so located only for short periods of time sufficient for the delivery and loading of the international cargo shipments contained therein.

V

The Assessor of the County of Los Angeles assessed against the subject cargo containers, and the Tax Collector of the County of Los Angeles levied taxes thereon as follows:

Plaintiff-Taxpayer	Appraisal	Assessment	Tax Levied
Japan Line	$ 885,500	$221,375	$26,617.46
Kawasaki Kisen Kaisha	977,720	244,430	29,389.52
Mitsui O.S.K. Line	1,228,860	307,215	36,938.60
Nippon Yusen Kaisha	1,213,400	303,350	36,473.89
Showa Shipping Co.	553,200	138,300	16,628.77
Yamashita-Shinnihon	835,400	208,850	25,111.49

Between August 14, 1971, and August 31, 1971, plaintiffs herein paid, under written protest, the amount of tax respectively levied against each of them. The grounds of the protest were set out in an exhibit accompanying the payment of the tax, which grounds are set forth in Exhibit "A" attached hereto and incorporated herein.

VI

At 12:01 A.M., on March 1, 1971, none of the cargo containers physically present within the City of

Los Angeles had acquired taxable situs in the County or City of Los Angeles. The subject containers were and are constantly committed to and engaged in the process of importation to and exportation from the United States and are integral to the transportation of goods aboard plaintiff's vessels exclusively in foreign commerce. As instrumentalities of foreign commerce, and due to their integral participation and exclusive use in foreign commerce and foreign movements of cargo, the containers were subject to taxation exclusively in Japan. Therefore, the said taxes were unlawfully levied and collected in that the subject containers were exempt from taxation by United States Constitution Article I Sections 8, 9 and 10, Amendment V and Amendment XIV; the Treaty of Friendship, Commerce and Navigation between the United States and Japan (especially Article XI and XVII) and, pursuant to the most-favored-nation provisions of that Treaty, (Article VI Section 4 and Article XI Section 3) under treaties with other nations; California Constitution Article 13 Sections 1 and 4; and Revenue and Taxation Code Section 201. The levying and collecting of the subject taxes subjected plaintiffs and the containers to double taxation, as between California and Japan, in violation of Revenue and Taxation Code Section 102. As movable property without a "normal place of return" between movements, the containers have situs exclusively at plaintiff's principal place of business, Japan. (See, e.g., 18 California Administrative Code 205.)

VII

The subject taxes were unlawfully levied and collected in that the assessment upon which the taxes were based was not made "on discovery" of the presence

of the subject containers as required by Revenue and Taxation Code Section 531.

VIII

No refund of said taxes, or any part thereof, has been made to plaintiffs.

WHEREFORE, plaintiffs pray for judgment against defendants in the respective amounts of taxes levied and paid as set forth in Paragraph V of this Complaint, together with interest thereon from the date of payment at the maximum rate of interest, which rate is no less than 8½% per annum from the date of payment, for costs of suit, and for such other and further relief as may be just and proper.

DATED: February 1, 1972

GRAHAM & JAMES
By /s/ Reed M. Williams
Reed M. Williams
Attorneys for Plaintiffs

DECLARATION

State of California, County of Los Angeles—ss.

I, the undersigned, say:

I am a member of the firm of GRAHAM & JAMES, attorneys for the Plaintiffs herein; said Plaintiffs are corporations, all of whose officers are absent from the County of Los Angeles, California, where said attorneys have their offices, and that I make this verification for and on behalf of said party for that reason; the foregoing document is true of my own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 1, 1972, at Long Beach, California.

/s/ Reed M. Williams
REED M. WILLIAMS

EXHIBIT A

1) The subject containers as "movable property" have not acquired situs in Los Angeles County under the standards of Rule 205 of the California Administrative Code, Title 18; and, pursuant to that Rule, have situs only at the principal place of business of the taxpayer, Japan.

2) The subject containers are integral to taxpayer's movement of cargo in foreign commerce.

a) They are instrumentalities of foreign commerce and are taxable only in taxpayer's domicile, Japan, under the "home port" doctrine and under the "commerce clause" of the United States Constitution, Article I, Section 8, Clause 3; Article XIII, Section 1, of the California Constitution; and Revenue and Taxation Code, Section 201, and the due process clauses of the United States Constitution Amendments V and XIV.

b) The containers are constantly engaged in the process of importation to and exportation from the United States, and, as such, are exempt from taxation under the "import-export" and "commerce" clauses (Article I, Sections 10 and 8(3) of the United States Constitution and under Article XIII, Section 1, of the California Constitution, and under Revenue and Taxation Code, Section 201, and the due process clauses, Amendments V and XIV to the United States Constitution.

3) The containers are integral parts of the vessels which transport the cargo and as such are exempt under Article XIII, Section 4, of the California Constitution, and Section 201 of the Revenue and Taxation Code.

4) These containers are exempt from taxation under the Treaty of Friendship, Commerce and Navigation between the United States and Japan and, pursuant to the most-favored-nation provision of that treaty, under treaties with other nations.

5) The presence of these containers in Los Angeles County was well known to the general public and the Assessor during the regular assessment period in 1971 and the escaped assessment is, therefore, void as not made "on discovery" as required by Revenue and Taxation Code Section 531.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

JAPAN LINE, LTD; MITSUI O.S.K. LINES LTD; KAWASAKI KISEN KAISHA, LTD; NIPPON YUSEN KAISHA; SHOWA SHIPPING CO., LTD; YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.; Plaintiffs, v. COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, Defendants.	CASE NUMBER CERTIFICATE OF ASSIGNMENT OR TRANSFER

A civil action or proceeding presented for filing in a district other than the Central District must be accompanied by this certificate. An action for personal injury, wrongful death or damage to property presented for filing in the Central District must be accompanied by this certificate. If the ground is the residence of a party, his name and residence shall be stated.

[X] The undersigned declares that the above entitled matter is filed for proceedings in the South District of the Superior Court under Rule 2, Section 3 of this court for the checked reason:

		Nature of Action	Ground
☐	1	Abandonment	Petitioner resides within the district
☐	2	Adoption	Petitioner resides within the district
☐	3	Conservator	Petitioner or conservatee resides within the district
☐	4	Contract	Performance in the district is expressly provided for
☐	5	Equity	The cause of action arose within the district
☐	6	Eminent Domain	The property is located within the district
☐	7	Family Law	Plaintiff, defendant, petitioner or respondent resides within the district
☐	8	Forceable Entry	The property is located within the district
☐	9	Guardianship	Petitioner or ward resides within the district
☐	10	Habeas Corpus	No action pending, the person is held within the district
☐	11	Mandate*	The defendant functions wholly within the district
☐	12	Name Change	The petitioner resides within the district
☐	13	Personal Property	The property is located within the district
☐	14	Probate	Decedent resided or petitioner resides within the district
☐	15	Prohibition*	The defendant functions wholly within the district
☐	16	Review*	The defendant functions wholly within the district
☐	17	Small Claims Appeal	The lower court is located within the district
☐	18	Title to Real Property	The property is located within the district
☐	19	TORT	The cause of action arose within the district
☐	20	TORT*	The cause of action arose outside of this county
☐	21	Transferred Action	The lower court is located within the district
☐	22	Unlawful Detainer	The property is located within the district
	23	Refund of Taxes	The property is located within the district.

The residence of the petitioner, respondent, deceased, conservatee, ward, plaintiff, or defendant Plaintiffs (Name)
is San Pedro, Wilmington, Long Beach (Address)

☐ Under Rule 2, Section 6, I allege that for the convenience of witnesses and to promote the ends of justice the matter should be transferred to the South District.

I declare under penalty of perjury that the foregoing is true and correct and this declaration was executed on February 1, 1972 at Long Beach, California.

(Signature of Attorney)

*Prerogative writs concerning a court of inferior jurisdiction and Tort Actions arising outside of the county may be filed in Central District only.

Complaint for Recovery of Taxes.

Superior Court of the State of California, for the County of Los Angeles.

Japan Line Ltd.; Mitsui O.S.K. Lines, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Nippon Yusen Kaisha Line; Showa Shipping Co., Ltd.; Yamashita-Shinnihon Steamship Co. Ltd., foreign corporations; Lilly Shipping Agencies, a corporation, Plaintiffs, vs. County of Los Angeles and City of Los Angeles, Defendants. No. SOC 30557.

Original Filed: Feb. 15, 1973.

Plaintiffs allege:

I

Plaintiffs are and at all times hereinafter mentioned were, corporations duly organized and existing under the laws of Japan or elsewhere, and excepting LILLY SHIPPING AGENCIES (hereafter "LILLY") were engaged primarily in the operation of steamships and containerships in the carriage of cargo in foreign commerce. LILLY was and is the agent of and for YAMASHITA-SHINNIHON STEAMSHIP CO., Ltd.

II

Defendant COUNTY OF LOS ANGELES is, and at all times hereinafter mentioned was, a political subdivision of the State of California.

III

Defendant CITY OF LOS ANGELES is, and at all times hereinafter mentioned was, a municipal corporation and political subdivision of the State of California. At all times mentioned herein, defendant COUNTY OF LOS ANGELES acted in part for defendant CITY OF LOS ANGELES in levying and collecting the taxes which are the subject matter of this Complaint.

IV

On March 1, 1972, at 12:01 A.M., plaintiffs were the owners and lessees of certain cargo containers located in the City of Los Angeles. Said containers are an integral part of the movement of goods in foreign commerce by Japanese plaintiff's vessels, which are registered under the laws of Japan, where each of Japanese plaintiffs has its corporate and commercial domicile and the home port of its vessels and containers. At all times when said containers are physically present in the City of Los Angeles, they are so located only for short periods of time sufficient for the delivery and loading of the international cargo shipments contained therein.

V

The Assessor of the County of Los Angeles assessed against the subject cargo containers, and the Tax Collector of the County of Los Angeles levied taxes thereon as follows:

Plaintiff-Taxpayer	Appraisal	Assessment	Tax Levied
Japan Line, Ltd.	$1,696,900	$424,225	$54,297.83
Kawasaki Kisen Kaisha, Ltd.	1,768,280	442,070	56,581.86
Mitsui O.S.K. Lines, Ltd.	1,342,200	335,550	42,948.05
Nippon Yusen Kaisha Line	1,173,920	293,480	37,563.38
Showa Shipping Co., Ltd.	564,340	141,085	18,057.89
Yamashita-Shinnihon Steamship Co., Ltd. & Lilly Shipping Agencies	731,040	182,760	23,392.00

Between June 19, 1972, and August 31, 1972, plaintiffs herein, excepting YAMASHITA - SHINNIHON STEAMSHIP CO., LTD., paid, under written protest, the amount of tax respectively levied against each of them. The grounds of the protest were set out in an exhibit accompanying the payment of the tax, which

grounds are set forth in Exhibit "A" attached hereto and incorporated herein. On or about June 19, 1972 LILLY, as agent for and on behalf of YAMASHITA-SHINNIHON STEAMSHIP CO., LTD. paid the amount of tax levied against YAMASHITA-SHINNIHON STEAMSHIP CO., LTD. and thereafter, on or about February 5, 1973 LILLY and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD. duly filed claim for refund (which has been denied) the grounds for which are likewise set forth in Exhibit "A" attached hereto and incorporated herein.

VI

At 12:01 A.M., on March 1, 1972, none of the cargo containers physically present within the City of Los Angeles had acquired taxable situs in the County or City of Los Angeles. The subject containers were and are constantly committed to and engaged in the process of importation to and exportation from the United States and are integral to the transportation of goods aboard Japanese plaintiff's vessels exclusively in foreign commerce. As instrumentalities of foreign commerce, and due to their integral participation and exclusive use in foreign commerce and foreign movements of cargo, the containers were subject to taxation exclusively in Japan. Therefore, the said taxes were unlawfully levied and collected in that the subject containers were exempt from taxation by United States Constitution Article I, Sections 8, 9 and 10, Amendment V and Amendment XIV; the Treaty of Friendship, Commerce and Navigation between the United States and Japan (especially Article XI and XVII) and, pursuant to the most-favored-nation provisions of that Treaty, (Article VI, Section 4 and Article XI, Section 3) under treaties with other nations; California Consti-

tution Article 13, Sections 1 and 4; and Revenue and Taxation Code Section 201. The levying and collecting of the subject taxes subjected plaintiffs and the containers to double taxation, as between California and Japan, in violation of Revenue and Taxation Code Section 102. As movable property without a "normal place of return" between movements, the containers have situs exclusively at Japanese plaintiff's principal place of business, Japan. (See, e.g., 18 California Administrative Code 205.)

VII

No refund of said taxes, or any part thereof, has been made to plaintiffs.

WHEREFORE, plaintiffs pray for judgment against defendants in the respective amounts of taxes levied and paid as set forth in Paragraph V of this Complaint, together with interest thereon from the date of payment at the maximum rate of interest, which rate is no less than 8½% per annum from the date of payment, for costs of suit, and for such other and further relief as may be just and proper.

DATED: February 14, 1973

GRAHAM & JAMES
By /s/ Reed M. Williams
Reed M. Williams
Attorneys for Plaintiffs

DECLARATION

State of California, County of Los Angeles—ss.

I, the undersigned, say:

I am a member of the firm of GRAHAM & JAMES, attorneys for the Plaintiffs herein; said Plaintiffs are

corporations, all of whose officers are absent from the County of Los Angeles, California, where said attorneys have their officers, and that I make this verification for and on behalf of said party for that reason; the foregoing Complaint For Recovery of Taxes is true of my own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 14, 1973, at Los Angeles, California.

/s/ Reed M. Williams
REED M. WILLIAMS

EXHIBIT "A"

1) The subject containers as "movable property" have not acquired situs in Los Angeles County under the standards of Rule 205 of the California Administrative Code, Title 18; and, pursuant to that Rule, have situs only at the principal place of business of the taxpayer, Japan.

2) The subject containers are integral to taxpayer's movement of cargo in foreign commerce.

a) They are instrumentalities of foreign commerce and are taxable only in taxpayer's domicile, Japan, under the "home port" doctrine and under the "commerce clause" of the United States Constitution, Article I, Section 8, Clause 3; Article XIII, Section 1, of the California Constitution; and Revenue and Taxation Code, Section 201, and the due process clauses of the United States Constitution Amendments V and XIV.

b) The containers are constantly engaged in the process of importation to and exporation from the United States, and, as such, are exempt from taxation under the "import-export" and "commerce" clauses (Article I, Sections 10 and 8 (3)) of he United States Constitution and under Article XIII, Section 1, of the California Constitution, and under Revenue and Taxation Code, Section 201, and the due process clauses, Amendments V and XIV to the United States Constitution.

3) The containers are integral parts of the vessels which transport the cargo and as such are exempt under Article XIII, Section 4, of the California Constitution, and Section 201 of the Revenue and Taxation Code.

4) These containers are exempt from taxation under the Treaty of Friendship, Commerce and Navigation between the United States and Japan and, pursuant to the most-favored-nation provision of that treaty, under treaties with other nations.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

JAPAN LINE, LTD.; MITSUI O.S.K. LINES, LTD; KAWASAKI KISEN KAISHA, LTD.; NIPPON YUSEN KAISHA LINE; SHOWA SHIPPING CO., LTD; YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.; Plaintiffs, v. COUNTY OF LOS ANGELES, CITY et al.	CASE NUMBER CERTIFICATE OF ASSIGNMENT OR TRANSFER

A civil action or proceeding presented for filing in a district other than the Central District must be accompanied by this certificate. An action for personal injury, wrongful death or damage to property presented for filing in the Central District must be accompanied by this certificate. If the ground is the residence of a party, his name and residence shall be stated.

[X] The undersigned declares that the above entitled matter is filed for proceedings in the South District of the Superior Court under Rule 2, Section 3 of this court for the checked reason:

		Nature of Action	Ground
☐	1	Abandonment	Petitioner resides within the district
☐	2	Adoption	Petitioner resides within the district
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☐	5	Equity	The cause of action arose within the district
☐	6	Eminent Domain	The property is located within the district
☐	7	Family Law	Plaintiff, defendant, petitioner or respondent resides within the district
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☐	21	Transferred Action	The lower court is located within the district
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	23	Refund of Taxes	The property is located within the district.

The residence of the petitioner, respondent, deceased, conservatee, ward, plaintiff, or defendant

is.. (Address) .... (Name)

☐ Under Rule 2, Section 6, I allege that for the convenience of witnesses and to promote the ends of justice the matter should be transferred to the South District.

I declare under penalty of perjury that the foregoing is true and correct and this declaration was executed on February 14, 1973 at Long Beach, California.

[signature]

(Signature of Attorney)

*Prerogative writs ...

Intended Decision.

Superior Court of the State of California, for the County of Los Angeles.

Japan Line, Ltd., et al., Plaintiffs, vs. County of Los Angeles, et al., Defendants. No. SO C 25617. (Consolidated for all purposes with: SO C 27593, and SO C 30557.)

Japan Line, Ltd., et al., Plaintiffs, vs. County of Los Angeles, et al., Defendants. No. SO C 27593.

Japan Line, Ltd., et al., Plaintiffs, vs. County of Los Angeles, et al., Defendants. No. SO C 30557.

The Court has before it three cases which were consolidated. They all have identical facts and parties, except that the periods in which an ad velorum tax was levied are different, to wit:

Case No. SO C 25617—March 2, 1972
Case No. SO C 27593—August 31, 1971
Case No. SO C 30557—August 31, 1972

Briefly, Los Angeles County has levied a property tax on cargo containers used by the five Japanese shipping lines who are parties plaintiff, based on the average number of containers constantly in Los Angeles County. These containers are owned and controlled by Japanese based concerns and only come into this country for the purpose of bringing in cargoes or shipping them out in foreign commerce. There is no interstate or intrastate use. The taxes were paid for the periods indicated under protest and this suit to recover followed.

Another case identical in nature has been previously tried by this Court and decided for the plaintiff (SO C 23482). This decision was not appealed, but since

that time the Court of Appeal has decided *Sea-Land vs. Alameda County*, (District 1, Div. 2) 36 C.A.(2) 825, and the defendant contends that that decision is controlling and at least calls for a reconsideration of the whole question.

The parties have stipulated to the facts and to the taxes paid each year, which exhibit is incorporated into this Intended Decision and made a part hereof as Exhibit A.

In SO C 23482, the Court found that the cargo containers were instrumentalities of foreign commerce and were a part of the ship. The *Sea-Land* case has taken the position that they are only instrumentalities of commerce to the extent that they provide a means for transferring cargo from one form of transportation to another (at page 832). This would belie the idea that they are an extension of the ship. The distinction makes no difference and as "instrumentalities of foreign commerce" they are still afforded the benefits of the "Home Port" rule.

Sea-Land was concerned with a domestic corporation (New Jersey) engaged in both foreign, inter and intrastate commerce and here lies the difference. There was no consideration of the "Home Port" rule as that was not involved; nor was any thought given to foreign treaties so well discussed in *Scandinavian Airlines vs. County of Los Angeles*, 56 Cal.(2) 11, cert. denied, 368 U.S. 899.

This Court is of the opinion that nothing has changed since the last decision on this matter, and therefore, adopts that part of the previous decision relating to Federal law, Home Port rule, and treaties. It is as follows:

Our Supreme Court in the *Scandinavian Airlines* system case made it clear that "Foreign Commerce" is a federal matter exclusively. It further stated that if the tax is repugnant to the treaty it cannot stand. Two treaties were considered here: The "General Agreement on Tariffs and Trade" and the "Treaty of Friendship, Commerce and Navigation Between the United States and Japan".

In the previous decision by this Court it was remarked in the Intended Decision that the Court didn't think the "Most Favored Nation" rule was applicable and that it based its ruling on the Treaty of Friendship, Commerce and Navigation Between the United States and Japan (1953), and the particular Article XI therein which provides that parties engaged in trade within the territory of the other party shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activties or any other object more burdensome than those borne by nationals of the host country.

A tax levied on the containers by Los Angeles County would violate this section, because it was stipulated that plaintiffs pay a tax in Japan. There is no way to prorate the same, as we do in interstate commerce. The Japanese would be paying a double tax, while a domestic company would, by reason of proration, be paying only one tax.

In addition to this, the Court now feels "The Most Favored Nation Rule" is likewise applicable, because we are favoring our nationals (by reason of only one total tax) as against our foreign parties.

It is also to be noted that U.S. companies pay no tax on containers in Japan (by stipulation). To

allow the tax levy would result in unequal treatment of our foreign parties.

To consider proration of taxes with foreign entitites is not practical. There is no tribunal that can adjudicate these rights unless it be the International Court and to invoke its services jurisdiction must be consented to by all parties. For this reason, our Federal Courts have consistently held that vessels which are instrumentalities of foreign commerce and engaged in foreign commerce can be taxed in their home port only.

Whether we consider the containers as a part of the ship or not, they do have a home port (Japan). They are engaged exclusively in foreign commerce and they are taxed in their home port so it presents no problem to extend to them the benefits of the "Home Port" rule.

The plaintiffs have conceded that certain generator sets were included in the taxes levied and that the tax on those was legal. The Court has, therefore, deducted stipulated amounts from the "Schedule of Payments" to reflect the true amounts in issue in this case.

Judgment will be for plaintiffs against defendants in amounts indicated in Exhibit A, plus interest at 7% per annum on the amounts indicated on Exhibit A under the particular plaintiff's name from the date of payment so indicated, excluding from such sums the portion thereof that was paid on generator sets.

Plaintiff will prepare judgment.

Dated: March 14, 1974.

HAMPTON HUTTON
JUDGE OF THE SUPERIOR COURT

SCHEDULE OF PAYMENT DATES

Tax Year	Date of Payment	J Line	K Line	M-O Line	NYK	Showa	Y-S Line
70-71	3-2-71	$ 20,512.32	$ 33,519.55	$ 33,543.68	$ 37,243.95	$ 15.954.03	$ 22,094.22
71-72	8-31-71	26,617.46	29,389.52	36,938.60	36,473.89	16,628.77	25,111.49
72-73	8-31-72	54,297.83	56,581.86	42,948.05	37,563.38	18,507.89	23,392.00
		$101,427.61	$119,490.93	$113,430.33	$111,281.22	$ 50,640.96	$ 70,597.71
	LESS	$ 794.76	$ 1,874.49	$ 2,175.08	$ 1,106.18		$ 1,181.32
		$100,632.85	$117,616.44	$111,255.25	$110,175.04		$ 69,416.39

Agreed Statement in Lieu of Clerk's and Reporter's Transcripts.

In the Court of Appeal of the State of California, Second Appellate District.

Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; Showa Shipping Co., Ltd.; Yamashita-Shinnihon Steamship Co., Ltd.; foreign corporations, Plaintiffs and Respondents, vs. County of Los Angeles and City of Los Angeles, Defendants and Appellants. Nos. SO C-25617, SO C-27593, SO C-30557.

Original Filed July 21, 1975.

Appeal from the Superior Court, Los Angeles County, Honorable Hampton Hutton, Judge.

Appearances:

GRAHAM and JAMES, 100 Oceangate, Suite 515, Long Beach, California 90802, Area Code (213) 435-4435, Counsel for Respondents.

JOHN H. LARSON, County Counsel, JAMES DEXTER CLARK, Deputy County Counsel, 648 Hall of Administration, Los Angeles, California 90012, Area Code (213) 974-1889, Counsel for Appellants.

—

AGREED STATEMENT IN LIEU

OF

CLERK'S AND REPORTER'S TRANSCRIPTS

—

Agreed Statement in Lieu of Clerk's and Reporter's Transcripts.

Superior Court of the State of California for the County of Los Angeles.

Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; Showa Shipping Co., Ltd.; Yamashita-Shinnihon Steamship Co., Ltd.; foreign corporations, Plaintiffs and Respondents, vs. County of Los Angeles and City of Los Angeles, Defendants and Appellants. Nos. SO C-25617, SO C-27593, SO C-30557.

Appellants herein submit and file with the Clerk, the Agreed Statement in Lieu of Clerk's and Reporter's Transcripts signed by the parties herein under California Rules of Court, Rule 6.

I

A copy of the Judgment is attached hereto.

II

A copy of the Notice of Appeal is attached hereto and was filed on December 12, 1974.

III

The nature of the controversy is whether cargo shipping containers, owned by Respondents, Japanese domiciliaries, and subject to and in fact taxed in Japan, and used exclusively for the transportation of cargo for hire in foreign commerce, may be taxed by Appellants, County and City, on an ad valorem basis.

IV

This is an appeal from the judgment of the Superior Court of Los Angeles County, South District, entered

on Plaintiffs' (Respondents herein) Complaints on October 15, 1974, in the amount of $559,736.66, plus interest as provided by Revenue and Taxation Code §5141, and against Defendants (Appellants herein). Original jurisdiction was vested in the Superior Court by California Constitution Article IV, Section V. On December 12, 1974, within sixty (60) days of entry of judgment, notice of appeal was filed by Appellants. A copy of said notice is attached hereto. Jurisdiction is conferred on this Court by California Constitution Article VI, 4b, (10 and 11).

V

The questions involved herein arose as the result of a levy of personal property tax on the Respondents' cargo shipping containers. The Appellants answered the Complaints, denying that the tax was unlawful. All three cases involved herein, covering a period of three years, were consolidated for all purposes. The Superior Court held that the tax was unlawful. Respondents paid the taxes under protest on the grounds set forth in their letter of protest which is attached hereto as Exhibit "A" and made a part hereof as if fully set forth herein. Complaints for recovery of taxes based on the same grounds were filed by Respondents.

VI

The facts which are stipulated on appeal are as follows:

1. There were present in Los Angeles County on lien dates 1970, 1971 and 1972 an unspecified number of cargo shipping containers owned and controlled by Plaintiffs and having the market values as set forth in the Findings of Fact.

2. Said containers were not concealed and their presence was open and obvious. Taxes on said cargo shipping containers were timely paid, under protest, as set forth in the Findings of Fact.

3. Said amounts are the correct amounts of the tax, assuming that all containers present on the lien date were subject to tax based on their total fair market values.

4. Said amounts of taxes were paid by Plaintiffs within six months prior to the commencement of the actions herein.

5. Said containers are used exclusively for the transportation of cargo for hire in foreign commerce.

6. Said containers are never used for intrastate or interstate transportation of cargo except as continuations of international voyages.

7. The interstate or intrastate movement of empty containers are solely for the purpose of picking up cargo to be carried in foreign commerce, or returning the containers to ports (principally Los Angeles), all containers thereafter moving by Plaintiffs' vessels to foreign countries.

8. All of the loaded containers physically present within Los Angeles County on the lien dates were loaded with cargo either inbound from or outbound to foreign ports.

9. All empty containers physically present within Los Angeles County on the lien dates were awaiting loading of cargo to be carried on Plaintiffs' vessels in foreign commerce, or carriage to other ports (principally in Japan) by Plaintiffs' vessels.

10. No container has a usual place of return in California or the United States between uses.

11. Each container is in constant transit save for repair time and time awaiting new cargo.

12. None of the containers present in Los Angeles County on lien dates 1970, 1971 or 1972 had been in California for as much as six months during the twelve months immediately preceding said lien dates.

13. The average stay of any of the containers in California at any one time is less than three weeks.

14. No container is permanently situated in California or scheduled, on departure from Los Angeles, to return to Los Angeles or any other place in California or the United States.

15. Plaintiffs are incorporated under the laws of Japan, and have their principal places of business and commercial domiciles in Japan.

16. All of Plaintiffs' vessels, on which the subject containers are carried, have their home port in and are registered in Japan, and are used exclusively in foreign commerce.

17. None of Plaintiffs' vessels on which the subject containers are carried is registered in the United States.

18. All of Plaintiffs' vessels on which the subject containers are carried are specifically designed and constructed to accommodate the subject containers, and carry only cargo in such containers.

19. In general, all containers carried by Plaintiffs' vessels as aforesaid, including the subject containers, upon arriving from Japan are discharged from said vessels in the Port of Los Angeles and either (1) transported by truck or rail to the ultimate inland destination of the imported cargo contained therein, or (2) unloaded in Los Angeles Harbor.

(a) Those containers transported to such inland destinations are unloaded at such destinations and are then either (1) reloaded with export cargo at an inland location and transported to one of Plaintiffs' vessels by truck or rail for export, or (2) returned empty by truck or rail to Los Angeles Harbor for export or for reloading for export, all containers thereafter moving by said vessels to Japan.

20. The inland (outside Los Angeles Harbor) destinations and origins of cargo carried in said containers include locations in other states, as well as in California.

21. An outbound container may leave the United States through any port, and need not leave through the port through which it entered the United States.

22. All containers of Plaintiffs are subject to property tax and are, in fact, taxed in Japan.

23. Plaintiffs have not received a refund of said taxes.

24. Said taxes were paid to and received by Defendants as set forth in the Findings of Fact.

25. During all periods referred to in Plaintiffs' complaints, cargo shipping containers owned or controlled by steamship companies domiciled in the United States, which containers from time to time were located in Japan while engaged in receiving and delivering cargo and awaiting shipment by vessel, were not subject to property taxation in Japan, and were not taxed in Japan.

26. The number of containers physically present in Los Angeles County on the lien dates 1970, 1971 and 1972 is fairly representative of the number of containers present in Los Angeles County on other dates throughout the tax year.

VII

The Court rendered Findings of Fact and conclusions of law, which are as follows:

FINDINGS OF FACT

1. On the first day of March 1970, 1971 and 1972, there were present in the City of Los Angeles and the County of Los Angeles certain cargo shipping containers owned and controlled by Plaintiffs, the fair market values and assessed values being as follows:

	Fair Market Values		
Plaintiff	1970	1971	1972
Japan Line, Ltd.	$ 765,000	$ 885,550	$1,696,900
Kawasaki Kisen Kaisha, Ltd	1,250,100	977,720	1,768,280
Mitsui O.S.K. Lines, Ltd	1,251,000	1,228,860	1,342,200
Nippon Yusen Kaisha	1,389,000	1,213,400	1,173,920
Showa Shipping Co.	595,000	553,200	564,340
Yamashita-Shinnihon Steamship Co.	824,000	835,400	731,040
	Assessed Values		
Japan Line, Ltd.	$191,250	$221,375	$424,225
Kawasaki Kisen Kaisha, Ltd.	312,525	244,430	442,070
Mitsui O.S.K. Lines, Ltd.	312,750	307,215	335,550
Nippon Yusen Kaisha	347,250	303,350	293,480
Showa Shipping Co.	148,750	138,300	141,085
Yamashita-Shinnihon Steamship Co.	206,000	208,850	182,760

2. Defendants assessed and levied taxes as follows against Plaintiffs with respect to said containers. The amounts of said taxes are properly calculated as follows:

Plaintiff	1970	1971	1972
Japan Line, Ltd.	$20,512.32	$25,822.70	$54,297.83
Kawasaki Kisen Kaisha, Ltd.	33,519.55	27,515.03	56,581.86
Mitsui O.S.K. Lines, Ltd.	33,543.68	34,763.52	42,948.05
Nippon Yusen Kaisha	37,243.95	35,367.71	37,563.38
Showa Shipping Co.	15,954.03	16,628.77	18,057.89
Yamashita-Shinnihon Steamship Co.	22,094.22	23,930.17	23,392.00

3. Plaintiffs timely paid said taxes, under protest, as follows:

Tax Year	*Date of Payment*
1970-1971	March 2, 1971
1971-1972	August 31, 1971
1972-1973	August 31, 1972

4. Plaintiffs' suits for refund of said taxes were filed within six months from the date of payment of said taxes.

5. No refund of said taxes has been made.

6. Plaintiffs are incorporated under the laws of Japan, and have their principal places of business and commercial domiciles in Japan.

7. All of Plaintiffs' vessels, on which the said containers are carried, have their home port in and are registered in Japan, and are used exclusively in foreign commerce.

8. All of Plaintiffs' vessels on which the said containers are carried are specifically designed and constructed to accommodate the said containers, and carry cargo only in said containers.

9. Said containers have their home port in Japan, and are used constantly and exclusively for the transportation of cargo for hire in foreign commerce.

10. No container has a usual place of return in California or the United States between uses.

11. Each container is in constant transit save for repair time, and time awaiting the loading of cargo.

12. None of the containers present in Los Angeles County on the first day of March 1970, 1971, or 1972 had been in California for as much as six months during the twelve months immediately preceding said dates.

13. The average stay of any of the containers in California at any one time is less than three weeks.

14. All containers of Plaintiffs are subject to property tax, and are, in fact, taxed in Japan.

15. During all periods referred to in Plaintiffs' complaints, those cargo shipping containers owned or controlled by steamship companies domiciled in the United States, and which from time to time were located in Japan while engaged in receiving and delivering cargo (being transported in foreign commerce) and awaiting shipment by vessel, were not subject to property taxation in Japan, and were not taxed in Japan.

16. The number of containers physically present in Los Angeles County on the lien dates 1970, 1971 and 1972 is fairly representative of the number of containers present in Los Angeles County on other dates throughout the tax year.

17. Any movements, or periods of non-movement of any of said containers while in the United States (whether said containers are empty or filled with car-

go), are incidental to and inseparable from the use of said containers in the transportation of cargo in foreign commerce, any such movements or periods of non-movement being essential to and solely for the efficiency and economic utilization of the containers as instrumentalities of foreign commerce.

CONCLUSIONS OF LAW

1. Said containers, as utilized by Plaintiffs at all times relevant hereto, are instrumentalities of foreign commerce.

2. That said containers are exempt from taxation by Defendants.

3. That Defendants unlawfully collected those taxes from Plaintiffs as set forth in Findings of Fact No. 2.

4. That Plaintiffs are entitled to a refund of said taxes.

5. That Plaintiffs have judgment against Defendants for the following sums:

Plaintiff	*Sum*
Japan Line, Ltd.	$100,632.85
Kawasaki Kisen Kaisha, Ltd.	117,616.44
Mitsui O.S.K. Lines, Ltd.	111,255.25
Nippon Yusen Kaisha	110,175.04
Showa Shipping Co.	50,640.69
Yamashita-Shinnihon Steamship Co.	69,416.39

together with interest pursuant to California Revenue and Taxation Code §5141 computed from the dates and on the amounts of payment as follows, until entry of judgment:

Plaintiff	Mar. 2, '71	Aug. 31, '71	Aug. 31, '71
Japan Line, Ltd.	$20,512.32	$25,822.70	$54,297.83
Kawasaki Kisen Kaisha, Ltd.	33,519.55	27,515.03	56,581.86
Mitsui O.S.K. Lines, Ltd.	33,543.68	34,763.52	42,948.05
Nippon Yusen Kaisha	37,243.95	33,367.71	37,563.38
Showa-Shipping Co.	15,9[illegible]4.03	16,628.77	18,057.89
Yamashita-Shinnihon Steamship Co.	22,094.22	22,930.17	23,392.00

together with costs of suit herein.

GRAHAM & JAMES
By /s/ Reed Williams
Reed Williams
Attorneys for Plaintiffs
and Respondents

JOHN H. LARSON
County Counsel
By /s/ James Dexter Clark
James Dexter Clark
Attorneys for Defendants
and Appellants

EXHIBIT A

1) The subject containers as "movable property" have not acquired situs in Los Angeles County under the standards of Rule 205 of the California Administrative Code, Title 18; and, pursuant to that Rule, have situs only at the principal place of business of the taxpayer, Japan.

2) The subject containers are integral to taxpayer's movement of cargo in foreign commerce.

a) They are instrumentalities of foreign commerce and are taxable only in taxpayer's domicile, Japan, under the "home port" doctrine and under

the "commerce clause" of the United States Constitution, Article I, Section 8, Clause 3; Article XIII, Section 1, of the California Constitution; and Revenue and Taxation Code, Section 201, and the due process clauses of the United States Constitution Amendments V and XIV.

b) The containers are constantly engaged in the process of importation to and exportation from the United States, and, as such, are exempt from taxation under the "import-export" and "commerce" clauses (Article I, Sections 10 and 8 (3) of the United States Constitution, and under Article XIII, Section 1, of the California Constitution, and under Revenue and Taxation Code, Section 201, and the due process clauses, Amendments V and XIV to the United States Constitution.

3) The containers are integral parts of the vessels which transport the cargo and as such are exempt under Article XIII, Section 4, of the California Constitution, and Section 201 of the Revenue and Taxation Code.

4) These containers are exempt from taxation under the Treaty of Friendship, Commerce and Navigation between the United States and Japan and, pursuant to the most-favored-nation provision of that treaty, under treaties with other nations.

5) The presence of these containers in Los Angeles County was well known to the general public and the Assessor during the regular assessment period in 1971 and the escaped assessment is, therefore, void as not made "on discovery" as required by Revneue and Taxation Code Section 531.

Judgment.

Superior Court of the State of California, for the County of Los Angeles.

Japan Line, Ltd., et al., Plaintiffs, v. County of Los Angeles and City of Los Angeles, Defendants. No. SO C 25617, SO C 27593, SO C 30557.

The above entitled causes came on regularly for trial on February 14, 1974. GRAHAM & JAMES and Reed M. Williams appeared as attorneys for plaintiffs. John H. Larson, County Counsel, and James Dexter Clark, Deputy County Counsel, appeared as attorneys for defendants. A jury trial having been waived, and the Court having heard the testimony and having heard and considered the evidence and the matters admitted by the parties, and the Court being fully advised in the premises and having filed its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith, now therefore by reason of the law and findings aforesaid, and good cause appearing:

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs have judgment against defendants in the following principal amounts, together with interest thereon, pursuant to California Revenue and Taxation Code §5141 from the dates specified hereafter to the date of entry of judgment;

JAPAN LINE, LTD.

Principal	$100,632.85
Interest	
($4,482.10 ($20,512.32 from 3-2-71)	
($3,877.50 ($25,822.70 from 8-31-71)	
($8,153.27 ($54,297.83 from 8-31-72)	
	$ 16,512.87
TOTAL	$117,145.72

KAWASAKI KISEN KAISHA, LTD.	
Principal	$117,616.44
Interest	
($7,324.27 ($33,519.55 from 3-2-71)	
($4,131.61 ($27,515.03 from 8-31-71)	
($8,496.25 ($56,581.86 from 8-31-72)	
	$ 19,952.13
TOTAL	$137,568.57
MITSUI O.S.K. LINES, LTD.	
Principal	$111,255.25
Interest	
($7,329.55 ($33,543.68 from 3-2-71)	
($5,220.03 ($34,763.52 from 8-31-71)	
($6,449.02 ($42,948.05 from 8-31-72)	
	$ 18,998.60
TOTAL	$130,253.85
NIPPON YUSEN KAISHA	
Principal	$110,175.04
Interest	
($8,138.09 ($37,243.95 from 3-2-71)	
($5,310.76 ($35,367.71 from 8-31-71)	
($5,640.45 ($37,563.38 from 8-31-72)	
	$ 19,089.30
TOTAL	$129,264.34
SHOWA SHIPPING CO., LTD.	
Principal	$ 50,640.69
Interest	
($3,486.08 ($15,954.03 from 3-2-71)	
($2,496.95 ($16,628.77 from 8-31-71)	
($2,711.54 ($18,057.89 from 8-31-72)	
	$ 8,694.57
TOTAL	$ 59,335.26
YAMASHITA SHINNIHON STEAMSHIP CO., LTD.	
Principal	$ 69,416.39
Interest	
($4,827.76 ($22,094.22 from 3-2-71)	
($3,593.31 ($23,930.17 from 8-31-71)	
($3,512.50 ($23,392.00 from 8-31-72)	
	$ 11,933.57
TOTAL	$ 81,349.96

together with costs of suit herein taxed in the amount of $..........................

Dated: Oct. 15, 1974.

HAMPTON HUTTON
JUDGE OF THE SUPERIOR COURT

Notice of Appeal.

Superior Court of the State of California, for the County of Los Angeles.

Japan Line, Ltd., et al., Plaintiffs, vs. County of Los Angeles and City of Los Angeles, Defendants. Nos.: SO C 25617, SO C 27593, SO C 30557.

NOTICE IS HEREBY GIVEN that the COUNTY OF LOS ANGELES and CITY OF LOS ANGELES, defendants, hereby appeal to the Court of Appeal of the State of California, Second District, Division .... from the Judgment rendered on October 15, 1974, and entered in Minute Book, Volume SO 225, Page 085, on October 15, 1974, in favor of Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha, Showa Shipping Co., Ltd., and Yamashita Shinnihon Steamship Co., Ltd., plaintiffs.

DATED: December 12, 1974.

JOHN H. LARSON
County Counsel
By /s/ James Dexter Clark
JAMES DEXTER CLARK
Deputy County Counsel
Attorneys for Defendants

DECLARATION OF SERVICE BY MAIL

State of California, County of Los Angeles

Doris Ross states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 648 Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 12th day of December, 1974, I served the attached NOTICE OF APPEAL upon Plaintiff's Attorneys by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a United States mail box in Los Angeles, California, addressed as follows: Reed Williams, Esq., Graham & James, 100 Oceangate, Long Beach, CA 90802 and that the person on whom said service was made has his office at a place where there is a delivery service by United States mail, and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Los Angeles, California. Dated: December 12, 1974.

/s/ Doris Ross

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Japan Lines, Ltd., et al., Plaintiffs and Respondents, v. County of Los Angeles and City of Los Angeles, Defendants and Appellants. 2d Civ. No. 47134. Sup. Ct. Nos. SOC 25617, SOC 27593, SOC 30557.

Filed: Aug. 27, 1976.

APPEAL from a judgment of the Superior Court of Los Angeles County. Hampton Hutton, Judge. Reversed.

John H. Larson, County Counsel, James Dexter Clark, Deputy County Counsel, for Defendants and Appellants.

Graham & James, and Reed M. Williams, for Plaintiffs and Respondents.

The sole question presented by this appeal upon an agreed statement from a tax refund judgment is whether appellants, the County and City of Los Angeles, may impose an apportioned ad valorem tax upon cargo shipping containers, taxed in Japan, used here essentially exclusively in foreign commerce and owned and controlled by Japanese taxpayers. These taxpayers are six shipping lines incorporated under the laws of Japan which have their principal places of business and commercial domiciles there.

FACTS

The facts as stipulated between the parties disclose that the containers at issue are in constant transit save for repair time and time awaiting new cargo. They are only intermittently physically present within

the jurisdictions of appellants for an average stay of less than three weeks. They are used exclusively for the transportation of cargo for hire in foreign commerce. They are either full or empty. The full containers are loaded with cargo inbound from or outbound to foreign ports. The empty containers are moved intrastate within California and interstate from California solely to pick up cargo to be carried in foreign commerce or to return the containers themselves to ports (principally Los Angeles) for placement aboard the taxpayers' outbound vessels. The containers are never used for either intrastate or interstate transportation of cargo except in continuation of international voyages.

The Taxpayers' Contentions

Since the judgment under appeal was rendered, our Supreme Court decided unanimously in the case of *Sea-Land Service, Inc. v. County of Alameda,* 12 Cal.3d 772, 775-776, that a California county may tax such containers, under circumstances of use essentially identical to those before us, where the containers were used mainly in foreign commerce[1] but were owned by a shipping company incorporated and commercially domiciled within this country.

The taxpayers contend that the *Sea-Land* decision is not dispositive of this case because, there, Sea-Land conceded that its containers were subject to local taxation within the United States. Its position was that such taxation must be done exclusively at the home port of its vessels. (*Sea-Land, supra,* at 781, 786.)

[1]The interstate commerce therein involved was via international waters between California and the east coast of the United States. (*Sea-Land, supra,* at 776.) The court made no distinction between the containers used in foreign commerce and those used in intercoastal commerce.

Here, the home ports of the taxpayers' vessels, which are specifically designed to carry the containers at issue, are in Japan. The taxpayers' vessels are likewise registered there rather than in the United States.

The initial position of the taxpayers on this appeal was that under both the home-port doctrine and the most favored nation provisions of the 1953 Treaty between the United States and Japan their containers are not subject to taxation by any jurisdiction except Japan.[2] In this connection, we note that the containers of the taxpayers are subject to property taxation in Japan and have actually been so taxed there. Similar containers, similarly used in Japan but owned and controlled by steamship companies domiciled in the United States, have not been so taxed there.

At oral argument counsel for the taxpayers advanced a new ground and an additional factual basis for their position that their containers, notwithstanding the continuous use of the containers in the United States within appellants' jurisdictions, are not subject to property taxation by any government except that of Japan. They there argued that the property taxes at issue constitute indirect tonnage duties prohibited by article I, section 10, clause 3 of the United States Constitution and, in support of one of their initial contentions that

[2]The taxpayers do not now claim though that their cargo containers have not acquired a taxable situs within California. In any event, the following language, used by our Supreme Court in *Sea-Land, supra,* 12 Cal.3d at 778, would appear to be entirely apposite: "While no specific container may be in the county for a substantial period of time, Sea-Land's containers are physically present in the county on every day of the year. Such habitual presence of containers creates a taxable situs, even though the identical containers are not there every day and even though none of the containers is continuously within the county." (Citations omitted.)

these taxes are also prohibited by applicable treaties, called our attention for the first time to the existence of the Supplementary Convention of 1964 (15 U.S.T. 1824) to the 1939 Convention between Sweden and the United States on double taxation. (54 Stat. 1759.)

We could disregard this new matter without any consideration thereof because, without any showing of justification therefor, it was presented after the normal briefing process had been concluded. (See *Lotts v. Board of Park Commrs.*, 13 Cal.App.2d 625, 636; *Sinclair v. Aquarius Electronics, Inc.*, 42 Cal.App.3d 216, 229.) But in the interest of being as fully informed as reasonably possible on the fundamental tax issue presented, we waived this obvious impropriety in the taxpayers' appellate procedure and asked for and obtained from the parties supplemental briefs on the new matter.

DISCUSSION

1. *The Home-Port Doctrine*

The taxpayers concede that in the field of interstate commerce the home-port doctrine has been superseded by the apportionment doctrine, but they argue that it is still extant in the area of foreign commerce where apportionment cannot be substituted except perhaps by treaty or other agreement. Our Supreme Court in *Scandinavian Airlines System, Inc. v. County of Los Angeles,* 56 Cal.2d 11, 15, 17, 33, 36-37 (hereafter *SAS*), applied the home-port doctrine to foreign owned, based, registered and taxed airplanes flying exclusively in foreign commerce and using Los Angeles quite infrequently as their sole United States terminus and thereby struck down the apportioned property taxes upon such planes which appellants had imposed.

In *Sea-Land,* though, our Supreme Court criticized the home-port doctrine at length (12 Cal.3d at 781-788) and labeled it "anachronistic." (*Id.* at 787.) It unanimously adopted the view of the minority in *SAS* that the possibility of international double taxation of instrumentalities of foreign commerce, which these containers admittedly are, was no reason to limit the local power to tax them upon a nondiscriminatory apportioned basis provided they had (as they did) a taxable situs here. (*Id.* at 786, 787-788.)

2. *The Tonnage Duty Prohibition*

Article I, section 10, clause 3 of the United States Constitution prohibits the imposition by states (and presumably their subdivisions) of tonnage duties. The taxpayers contend that this prohibition invalidates the local property taxes at issue since they in practical effect are tonnage duties upon the cargo containers.

We disagree. In the recent case of *Michelin Tire Corp. v. Wages* (1976) .... U.S. ...., ... [46 L.Ed.2d 495, 500], the United States Supreme Court held that the assessment by Georgia of a nondiscriminatory ad valorem property tax against imported tires was not within the constitutional prohibition against the laying of any impost or duty on imports. In support of this holding the court pointed out that imposts and duties "are essentially taxes on the commercial privilege of bringing goods into a country," while nondiscriminatory ad valorem property taxes of the kind before us are taxes by which a state apportions the costs of its general services among the beneficiaries thereof (*Michelin, supra,* at 504) and that the words "imposts" and "duties", as used in 1787, clearly meant only "exactions upon imported goods *as imports.*" (Emphasis added.)

(*Id.* at 506, 502.) This being so, the taxes at issue may not be regarded as tonnage duties prohibited by article I, section 10, clause 3 of the United States Constitution.[3]

3. *The Treaty Question*

The taxpayers contend that the local taxation at issue violates certain treaty obligations of the United States and is therefore invalid under the supremacy clause of the United States Constitution (art. VI, cl. 2). (*SAS, supra,* 56 Cal.2d 11, 37.) In support of this contention they point out first, that the aforementioned 1953 Treaty between the United States and Japan (4 U.S.T. 2063) contains most favored nation provisions with respect to the ownership and possession of movable property and taxes. (Art. IX, § 2; art. XI, § 3; art. XXII, § 2; 4 U.S.T. 2071, 2072, 2079.) They then note that in the just-mentioned *SAS* case our Supreme Court held that the terms of the previously mentioned 1939 Convention between the United States and Sweden respecting double taxation (54 Stat. 1759) prevented appellants herein from generally taxing Swedish-owned property, including particularly airplanes (56 Cal.2d at 39) and, therefore, the Japanese-owned containers before us are likewise exempt from taxation by appellants pursuant to the just-mentioned most favored nation provisions of the 1953 Treaty between the United States and Japan. The *SAS* court based its

[3]In *Sea-Land, supra,* 12 Cal.3d at 789, our Supreme Court expressly rejected the contention that the similar cargo containers therein involved were exempted from local property taxation by the immediately preceding clause of the United States Constitution. According to that decision the protection against local taxation afforded by that clause extended only to goods and commodities in the import-export stream and not to the containers which were merely a means of transport suitable for repeated use.

holding largely on the provisions of article XIII, subdivision 2 of the Swedish Convention (54 Stat. 1766), applying generally apparently to movable property, but the taxpayers argue that their containers are also exempt from local property taxation by appellants under other provisions of the aforementioned Swedish Convention (arts. IV and XIII, subd. (1)(b) (54 Stat. 1761, 1766)) exempting instrumentalities of foreign commerce (i.e., ships and airplanes). Finally, the taxpayers argue that by reason of the modification made in the Swedish Convention by the aforementioned 1964 Supplementary Convention thereto (15 U.S.T. 1825) the local property taxation of appellants at issue is precluded by the provision in the convention prohibiting nonreciprocal taxation.[4]

We reject the foregoing argument totally. We do not think that either the holding of the *SAS* case or the Supplementary Convention (which came into existence after the *SAS* decision) invalidates appellants' nondiscriminatory ad valorem taxation of these containers. The *SAS* holding on its facts prohibits only local taxation of foreign owned, based and registered *airplanes.* (56 Cal.2d at 42.) It does not apply to cargo containers as such. The taxpayers seek to extend this holding nevertheless and the relevant treaty prohibi-

[4]The Supplementary Convention, among other things, replaced paragraph 7 of its protocol (54 Stat. 1777) with a new paragraph 7, reading as follows:

"7. The citizens of one of the contracting States shall not, while resident in the other State, be subject therein to other or more burdensome taxes than are citizens of that other State residing in its territory. The term 'citizens' as used in this paragraph, includes also all legal persons, partnerships, and associations created or organized under the laws in force in the respective contracting State. In this paragraph the word 'taxes' means taxes of every kind or description, whether Federal[,] State, or municipal." (15 U.S.T. 1831-1832.)

tions as well as describing both the airplanes involved in the *SAS* case and the containers involved here as instrumentalities of commerce. This generic description of ships and airplanes does not appear, in the relevant provisions of the 1939 Convention between Sweden and the United States. Furthermore, the *SAS* court did not view the airplanes there involved as instrumentalities of commerce, but instead as instrumentalities of communication, whose activities in this country were confined to the port of entry. (See 56 Cal.2d at 33.) In any event, so far as the convention with Sweden is concerned, then Justice Traynor pointed out in his dissent in the *SAS* case that, properly interpreted, this treaty does not apply to local property taxation at all. (56 Cal.2d at 47-48.)

The same thing, however, cannot be said with respect to the Supplementary Convention thereto. But in advising ratification by the United States of this convention, the United States Senate did so on the basis of a report from its Foreign Relations Committee, which stated that the replacement paragraph in its protocol (which we quoted in footnote 4) merely restated "for the sake of clarity" the requirement of its predecessor paragraph of nondiscriminatory tax treatment as between citizens and noncitizens (Tax Conventions and Protocols with Luxembourg, the Netherlands, Sweden and Japan, Report of the Senate Foreign Relations Committee, Ex. Report No. 10, 88th Cong., 2d Sess. 1964, p. 65).[5] Admittedly, the taxation at issue in this case does not violate this requirement.

[5]In determining the effect of an international agreement as domestic law, a court of the United States is to some extent required to take into account domestic sources in the formation of an international agreement such as committee reports indicative of the meaning that the United States Senate

DISPOSITION

The judgment is reversed.

CERTIFIED FOR PUBLICATION

Cobey, *J.*

We concur:

ALLPORT, *Acting P.J.*
POTTER, *J.*

has attached to an international agreement in cases where the agreement, as a matter of internal law, requires the assent of the Senate (Rest. 2d, Foreign Relations Law of the United States (1965) § 151, com. (b)(i) pp. 462-463, compare Traynor, J., dissent, *SAS, supra,* 56 Cal.2d at 48).

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California.

Japan Line, Ltd., et al., Plaintiffs and Respondents, v. County of Los Angeles et al., Defendants and Appellants. Super. Ct. Nos. SO C-25617, CO C-27593, SO C-30557.

In this action for recovery of ad valorem personal property taxes paid under protest, defendants City of Los Angeles and County of Los Angeles appeal from a judgment entered after a nonjury trial in favor of plaintiffs and against defendants for the recovery of said taxes together with interest and costs. After decision by the Court of Appeal, Second Appellate District, Division Three, reversing the judgment, we granted a hearing in this court for the purpose of giving further consideration to the issues raised. Having made a thorough examination of the cause, we have concluded that the opinion of the Court of Appeal prepared by Justice Cobey and concurred in by Acting Presiding Justice Allport and Justice Potter correctly treats and disposes of the issues involved and we adopt such opinion as and for the opinion of this court. That opinion (with appropriate additions and deletions) is as follows:*

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*Brackets together, in this manner [] *without enclosing material,* are used to indicate deletions from the opinion of the Court of Appeal; brackets *enclosing material* (other than editor's parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court. We thus avoid the extension of quotation marks within quotation marks, which would be incident to the use of such conventional punctuation, and at the same time accurately indicate the matter quoted. In so doing, we adhere to a method of adoption employed by us in the past. (See Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 311, fn. 2, and cases there cited.)

The sole question presented by this appeal upon an agreed statement from a tax refund judgment is whether appellants, the County of Los Angeles and the City of Los Angeles, may impose an apportioned ad valorem tax upon cargo shipping containers, taxed in Japan, used here essentially exclusively in foreign commerce and owned and controlled by Japanese taxpayers. These taxpayers are six shipping lines incorporated under the laws of Japan which have their principal places of business and commercial domiciles there.

FACTS

The facts as stipulated between the parties disclose that the containers at issue are in constant transit save for repair time and time awaiting new cargo. They are only intermittently physically present within the jurisdictions of appellants for an average stay of less than three weeks. They are used exclusively for the transportation of cargo for hire in foreign commerce. They are either full or empty. The full containers are loaded with cargo inbound from or outbound to foreign ports. The empty containers are moved intrastate within California and interstate from California solely to pick up cargo to be carried in foreign commerce or to return the containers themselves to ports (principally Los Angeles) for placement aboard the taxpayers' outbound vessels. The containers are never used for either intrastate or interstate transportation of cargo except in continuation of international voyages.

The Taxpayers' Contentions

Since the judgment under appeal was rendered, [] [this court] decided unanimously in the case of Sea-Land Service, Inc. v. County of Alameda [1974] 12

Cal.3d 772, 775-776, that a California county may tax such containers, under circumstances of use essentially identical to those before us, where the containers were used mainly in foreign commerce[1] but were owned by a shipping company incorporated and commercially domiciled within this country.

The taxpayers contend that the *Sea-Land* decision is not dispositive of this case because, there, Sea-Land conceded that its containers were subject to local taxation within the United States. Its position was that such taxation must be done exclusively at the home port of its vessels. (*Sea-Land, supra,* at pp. 781, 786.) Here, the home ports of the taxpayers' vessels, which are specifically designed to carry the containers at issue, are in Japan. The taxpayers' vessels are likewise registered there rather than in the United States.

The initial position of the taxpayers on this appeal was that under both the home-port doctrine and the most favored nation provisions of the 1953 treaty between the United States and Japan their containers are not subject to taxation by any jurisdiction except Japan.[2] In this connection, we note that the containers

[1]The interstate commerce therein involved was via international waters between California and the East Coast of the United States. (*Sea-Land, supra,* at p. 776.) [] [This] court made no distinction between the containers used in foreign commerce and those used in intercoastal commerce.

[2]The taxpayers do not now claim though that their cargo containers have not acquired a taxable situs within California. In any event, the following language [] in *Sea-Land, supra,* 12 Cal.3d at p. 778, would appear to be entirely apposite: "While no specific container may be in the county for a substantial period of time, Sea-Land's containers are physically present in the county on every day of the year. Such habitual presence of containers creates a taxable situs, even though the identical containers are not there every day and even though none of the containers is continuously within the county." (Citations omitted).

of the taxpayers are subject to property taxation in Japan and have actually been so taxed there. Similar containers, similarly used in Japan but owned and controlled by steamship companies domiciled in the United States, have not been so taxed there.

At oral argument [before the Court of Appeal] counsel for the taxpayers advanced a new ground and an additional factual basis for their position that their containers, notwithstanding the continuous use of the containers in the United States within appellants' jurisdictions, are not subject to property taxation by any government except that of Japan. They there argued that the property taxes at issue constitute indirect tonnage duties prohibited by article I, section 10, clause 3 of the United States Constitution and, in support of one of their initial contentions that these taxes are also prohibited by applicable treaties, called our attention for the first time to the existence of the supplementary convention of 1964 (15 U.S.T. 1824) to the 1939 convention between Sweden and the United States on double taxation. (54 Stat. 1759.)

We could disregard this new matter without any consideration thereof because, without any showing of justification therefor, it was presented after the normal briefing process had been concluded. (See Lotts v. Board of Park Commrs. [1936] 13 Cal.App.2d 625, 636; Sinclair v. Aquarius Electronics, Inc. [1974] 42 Cal.App.3d 216, 229.) But in the interest of being as fully informed as reasonably possible on the fundamental tax issue presented, [] [the Court of Appeal] waived this obvious impropriety in the taxpayers' appellate procedure and asked for and obtained from the parties supplemented briefs on the new matter.

DISCUSSION

1. *The Home-port Doctrine*

The taxpayers concede that in the field of interstate commerce the home-port doctrine has been superseded by the apportionment doctrine, but they argue that it is still extant in the area of foreign commerce where apportionment cannot be substituted except perhaps by treaty or other agreement. [] [They urge that] in Scandinavian Airlines System, Inc. v. County of Los Angeles [1961] 56 Cal.2d 11, 15, 17, 33, 36-37 (hereafter *SAS*), [this court] applied the home-port doctrine to foreign owned, based, registered and taxed airplanes flying exclusively in foreign commerce and using Los Angeles quite infrequently as their sole United States terminus and thereby struck down the apportioned property taxes upon such planes which appellants had imposed.

[] [However, in *Sea-Land* we specifically addressed this very contention (12 Cal.3d at pp. 784-786), namely that the home-port doctrine retained vitality with respect to foreign commerce as distinguished from interstate commerce pursuant to our decision in *SAS*, and clearly rejected it. First, we concluded that "we are not inhibited by *SAS* from concluding that the home-port doctrine does not shield the property of a taxpayer from a fairly apportioned ad valorem tax levied by a nondomiciliary jurisdiction with which the taxpayer has sufficient contacts, even if the taxpayer is engaged in foreign commerce. . . . The principles of apportioned taxation enunciated in *Pullman, Ott* and *Braniff* are to be applied to instrumentalities so engaged." (*Id.* at p. 786.) Second, we specifically adopted the reasoning of Justice Traynor in his dissent in *SAS* to the

effect that the threat of double taxation from foreign taxing authorities has no role in commerce clause considerations of multiple burdens, since burdens in international commerce are not attributable to discrimination by the taxing state and are matters for international agreement. (*Id.* at p. 788.)

The only asserted distinction between the case at bench and *Sea-Land* is that the cargo shipping containers in *Sea-Land* were owned by a United States corporation whereas the containers herein are owned by foreign corporations. The taxpayers have failed to cite any authority which would support a conclusion that instrumentalities of commerce used in foreign commerce are subject to different constitutional protection depending upon whether they are owned by foreign or domestic corporations. Existing authority supports the opposite conclusion. For example in Canadian Pac. Ry. Co. v. King Co. (1916) 90 Wash. 38, the Washington Supreme Court rejected the home-port doctrine and applied to a Canadian railway corporation the apportionment rule applied by the United States Supreme Court to the rolling stock of a domestic railway corporation used in foreign commerce in Pullman's Car Co. v. Pennsylvania (1891) 141 U.S. 18, 23. *Sea-Land* is fully dispositive of the commerce clause and federal exclusivity issues raised in the case at bench.]

2. *The Tonnage Duty Prohibition*

Article I, section 10, clause 3 of the United States Constitution prohibits the imposition by states [] of tonnage duties. The taxpayers contend that this prohibition invalidates the local property taxes at issue since they in practical effect are tonnage duties upon the cargo containers.

We disagree. In the recent case of Michelin Tire Corp. v. Wages (1976) 423 U.S. 276, the United States Supreme Court held that the assessment by Georgia of a nondiscriminatory ad valorem property tax against imported tires was not within the constitutional prohibition against the laying of any impost or duty on imports. In support of this holding the court pointed out that imposts and duties "are essentially taxes on the commercial privilege of bringing goods into a country," while nondiscriminatory ad valorem property taxes of the kind before us are taxes by which a state apportions the costs of its general services among the beneficiaries thereof (*Michelin, supra,* at pp. 286-287) and that the words "imposts" and "duties," as used in 1787, clearly meant only "exactions upon imported goods *as imports*." (Italics added.) (*Id.* at pp. 290-291, 283.)[8] [ ]

[The taxpayers contend that the *Michelin* holding that a nondiscriminatory ad valorem property tax was not an "impost" or "duty" is not determinative of the case at bench because the cargo containers herein were in import-export transit. They urge that the court in *Michelin* specifically stressed that the goods in that case were no longer in import transit. (See 423 U.S. at pp. 286, 302.) The contention is of no avail to taxpayers.

The cargo containers are not being taxed while in transit. Rather they are being taxed on an apportioned

[8]In *Sea-Land, supra,* 12 Cal.3d at p. 789, [ ] [we] expressly rejected the contention that the similar cargo containers therein involved were exempted from local property taxation by the [ ] [import-export] clause of the United States Constitution. [ ] [T]he protection against local taxation afforded by that clause extended only to goods and commodities in the import-export stream and not to the containers which were merely a means of transport suitable for repeated use.

basis for their continuous presence in the state. Some containers are continuously present in the state throughout the year, even though not necessarily the same containers. The continuous presence of these containers, as well as any instrumentality of commerce, involves the constant use of many services provided by the state and, here, the county; e.g., harbor facilities, roads, bridges, water supply, as well as fire and police protection. The Supreme Court has held that states may impose a property tax on these moving instrumentalities of commerce on an apportioned basis in order to meet the expenses of services within the taxing jurisdiction. (Clyde Mallory Lines v. Alabama (1935) 296 U.S. 261, 265-266; Cox v. Lott (1870) 79 U.S. 204, 213; Pullman's Car Co. v. Pennsylvania, *supra,* 141 U.S. 18.) In *Sea-Land* we affirmed the apportionment formula used in the case at bench to determine the continuous presence of the cargo containers there involved. It is the continuous presence within the jurisdiction drawing upon the service of that jurisdiction to a significant degree which permits reimbursement through nondiscriminatory property taxation as opposed to the fleeting presence of imported goods in transit which may possibly be exempted from such taxation by *Michelin.*

If *Michelin* is inapplicable to resolution of the issues herein as taxpayers contend, then the traditional tonnage clause analysis applies, *viz.,* while the tonnage clause prohibits states from taxing access to their territories, it does not prohibit states from making charges for services rendered and enjoyed by those instrumentalities of foreign or insterstate commerce within their jurisdiction. (Clyde Mallory Lines v. Alabama, *supra,* 296 U.S. 261, 265-266; Cox v. Lott, *supra,* 79 U.S. 204, 213.) The court in *Michelin* pointed out that

nondiscriminatory ad valorem property taxes are taxes by which the state apportions the costs of services, such as police and fire protection. (423 U.S. at p. 287.) Even under traditional tonnage clause analysis this property tax would be valid.

Thus plaintiffs' further insistent assertion that the tax liability is created by entry into the taxing jurisdiction must fall and with it the contention that the tax herein is a tonnage duty levied upon the entry of the containers into the jurisdiction.]

3. *The Treaty Question*

The taxpayers contend that the local taxation at issue violates certain treaty obligations of the United States and is therefore invalid under the supremacy clause of the United States Constitution (art. VI, cl. 2). (*SAS, supra,* 56 Cal.2d 11, 37.) In support of this contention they point out first, that the aforementioned 1953 treaty between the United States and Japan (4 U.S.T. 2063) contains most favored nation provisions with respect to the ownership and possession of movable property and taxes. (Art. IX, § 2; art. XI, § 3; art. XXII, § 2; 4 U.S.T. 2071, 2072, 2079.) They then note that in the just-mentioned *SAS* case [] [we] held that the terms of the previously mentioned 1939 convention between the United States and Sweden respecting double taxation (54 Stat. 1759) prevented appellants herein from generally taxing Swedish-owned property, including particularly airplanes (56 Cal.2d at p. 39) and, therefore, the Japanese-owned containers before us are likewise exempt from taxation by appellants pursuant to the just mentioned most favored nation provisions of the 1953 treaty between the United States and Japan. [] [This court in *SAS*] based its

holding largely on the provisions of article XIII, subdivision 2 of the Swedish convention (54 Stat. 1766), applying generally apparently to movable property, but the taxpayers argue that their containers are also exempt from local property taxation by appellants under the provisions of the aforementioned Swedish convention (arts. IV and XIII, subd. (1)(b); 54 Stat. 1761, 1766) exempting instrumentalities of foreign commerce (i.e., ships and airplanes). Finally, the taxpayers argue that by reason of the modification made in the Swedish convention by the aforementioned 1964 supplementary convention thereto (15 U.S.T. 1825) the local property taxation of appellants at issue is precluded by the provision in the convention prohibiting nonreciprocal taxation.[4]

We reject the foregoing argument totally. We do not think that either the holding of the *SAS* case or the supplementary convention (which came into existence after the *SAS* decision) invalidates appellants' nondiscriminatory ad valorem taxation of these containers. The *SAS* holding on its facts prohibits only local taxation of foreign owned, based and registered *airplanes*. (56 Cal.2d at p. 42.) It does not apply to cargo containers as such. The taxpayers seek to extend this holding nevertheless and the relevant treaty

[4]The supplementary convention, among other things, replaced paragraph 7 of its protocol (54 Stat. 1777) with a new paragraph 7, reading as follows:

"7. The citizens of one of the contracting States shall not, while resident in the other State, be subject therein to other or more burdensome taxes than are citizens of that other State residing in its territory. The term 'citizens' as used in this paragraph, includes also all legal persons, partnerships, and associations created or organized under the laws in force in the respective contracting State. In this paragraph the word 'taxes' means taxes of every kind or description, whether Federal[,] State, or municipal." [15 U.S.T. 1831-1832.)

prohibitions as well by describing both the airplanes involved in the *SAS* case and the containers involved here as instrumentalities of commerce. This generic description of ships and airplanes does not appear, in the relevant provisions of the 1939 convention between Sweden and the United States. [] In any event, so far as the convention with Sweden is concerned, [] [as] Justice Traynor pointed out in his dissent in the *SAS* case that, properly interpreted, this treaty does not apply to local property taxation at all. (56 Cal.2d at pp. 47-48.)

The same thing, however, cannot be said with respect to the supplementary convention thereto. But in advising ratification by the United States of this convention, the United States Senate did so on the basis of a report from its Foreign Relations Committee, which stated that the replacement paragraph in its protocol (which we quoted in fn. 4) merely restated "for the sake of clarity" the requirement of its predecessor paragraph of nondiscriminatory tax treatment as between citizens and non-citizens (Tax Conventions and Protocols with Luxembourg, the Netherlands, Sweden and Japan, Rep. of the Sen. Foreign Relations Com., Ex. Rep. No. 10, 88th Cong., 2d Sess. at p. 65 (1964)).[5] Admittedly the taxation at issue in this case does not violate this requirement.

[5]In determining the effect of an international agreement as domestic law, a court of the United States is to some extent required to take into account domestic sources in the formation of an international agreement such as committee reports indicative of the meaning that the United States Senate has attached to an international agreement in cases where the agreement, as a matter of international law, requires the assent of the Senate (Rest. 2d Foreign Relations Law of the United States (1965) § 151, com. (b)(i), pp. 462-463; compare Traynor, *J.*, dissent, *SAS, supra,* 56 Cal.2d at p. 48).

DISPOSITION

The judgment is reversed.

[]

Manuel, *J.*

We concur:

Bird, *C. J.*
Tobriner, *J.*
Mosk, *J.*
Clark, *J.*
Richardson, *J.*
*Jefferson, *J.*

*Assigned by the Chairperson of the Judicial Council.

Order Modifying Opinion.

In the Supreme Court of the State of California.

Japan Line, Ltd., et al, Plaintiffs and Respondents, v. County of Los Angeles et al., Defendants and Appellants, L.A. 30703 Super Ct. Nos. SO C-25617, SO C-27593, SO C-30557. Filed Dec. 28, 1977.

THE COURT:

It is ordered that the opinion filed herein on November 18, 1977, and reported in the Official Reports (20 Cal.3d 180) be modified in the following particulars:

1. On page 187, line 7 of the second full paragraph, the words "the county" are changed to the words "local entities" so the sentence reads:

> The continuous presence of these containers, as well as any instrumentality of commerce, involves the constant use of many facilities provided by the state and here, local entities; e.g., harbor facilities, roads, bridges, water supply, as well as fire and police protection.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

Dec. 28, 1977

I have this day filed Order Rehearing Denied In re: L.A. No. 30703 Japan Line, Ltd. vs. County of Los Angeles

Respectfully,
G. E. Bishel
Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1977
No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

vs.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

ON APPEAL
FROM THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

JOHN H. LARSON
County Counsel

JAMES DEXTER CLARK
Deputy County Counsel

648 Hall of Administration
Los Angeles, California 90012
(213) 974-1833

Counsel for Appellees

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648 Hall of Administration
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(213) 974-1833

Counsel for Appellees

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Appellants,

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Appellees.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the appellees hereby move this Court for an order affirming the judgment below or dismissing this appeal. Should the appeal be construed as a petition for certiorari, the appellees move the Court for an order denying the petition for certiorari. The California Supreme Court opinion is reported at 20 Cal. 3d 180, 141 Cal. Rptr. 905, 571 P.2d 254. The appellate court decision may be found at 132 Cal. Rptr. 531.

These motions are made on the grounds set forth below.

I

AN APPEAL IS INAPPROPRIATE IN THIS CASE

The appellants have asserted that appeal is the apprpriate mode for this Court to take jurisdiction of this matter. They suggest that 28 United States Code §1257(2) gives them the right to appeal. They further suggest that the statute, whose constitutionality was upheld, is California Revenue and Taxation Code §201.

It is clear from all of the decisions and briefs below, however, that this section was hardly touched upon by the parties and not addressed at all by any of the courts. If the issue had revolved around a specific statute, the provision addressed would have more likely been Article XIII, §1 of the California State Constitution, not Revenue and Taxation Code §201, which simply impliments the State constitutional mandate.

Thus, 28 United States Code §1257(2) simply does not apply. The assertion of the appellants throughout is that they have the advantage of a Federal constitutional immunity from the uniform application of the California property tax. Such immunity is properly raised by petition for certiorari pursuant to 28 U.S.C. §1257(3).

II

THE APPELLANTS' NEW FACTS TO SUPPORT A NEW ISSUE ARE INCORRECT AND MISLEADING

The appellants have suggested that new facts regarding a totally new issue cast a different light on this case and rebut the characterization of the property tax made by the California Supreme and Appellate Courts.

The characterization of the property tax as supporting local services rendered to property or because of its presence, is usual (see Watchtower Bible & Tract Society v. County of Los Angeles, 181 Fed.2d 739, 740 (C.A. 9th 1950), cert. den. 340 U.S. 820, 95 L.Ed. 602, 71 S.Ct. 51; Ralston Purina Co. v. County of Los Angeles, 56 Cal.App. 3d 547, 561, 128 Cal.Rptr. 556 (1976), her. den.; Ellis v. Title Ins. & Trust Co., 227 Cal.App.2d 204, 38 Cal.Rptr. 605 (1964); Michelin Tire Corp. v. Wages, 423 U.S. 276, 286, 46 L.Ed.2d 495, 96 S.Ct. 535 (1976).

In order to overcome the characterization of the property tax in general and the California property tax in particular which was expressed below, the appellants offer some excerpts of state and county reports and three "summary sheets" of computations apparently made by appellants' counsel. Both the "facts" and the computations are totally incorrect:

1. The appellants' assumption of what constitutes services to its property would exclude inspection made by the fire departments, jails, the courts, the property tax assessor, legal and administrative support, to mention a few. In addition,

these items are not found in appellants' incomplete evidence.

2. The appellants' computations assume that the total revenues of the county came from property taxes. A review of their own "evidence" shows that for 1972-73 for instance, only $839,202,727.00 comes from property taxes. Aid from other governments is almost exclusively directed to health and welfare.

3. Even the appellants' concluding computations do not support the statement to the effect that two percent of personal property taxes are devoted to "property related" services. They first show what percentage of the total county revenues go toward "property related" services. But instead of applying that percentage against personal property taxes, they go through two additional stages to compute the percentage of the total revenue which is personal property taxes devoted to "property related services." Obviously this last percentage does not show the percent of the appellants' taxes devoted to such services, but is a meaningless ratio.

4. The appellants have ignored the fact that the county is only one of three appellees. No consideration has been given to the city expenditures on fire, police, roads, and overhead, at all.

Any inquiry which deals with "property related services," must also include services rendered by the localities as a result of the presence of the property. It would be appropriate to consider whether by bringing business property

into the taxing jurisdiction, the resulting increase in employment opportunities increases the burdens on the public school, health delivery and welfare systems. The localities should be collecting property tax revenues to support services which must be rendered as a result of the presence of the property.

Finally, the effect of the deduction for property taxes from both state and federal income taxes (often amounting to an effective 50% or more of the property taxes paid) should be considered.

The appellees offer to present evidence regarding all of the matters omitted by the appellants including a showing that a great majority, and possibly all, of the appellants' property taxes go to support services rendered to properties, or because of their presence in the taxing jurisdiction. But the appellees contend that the appellants' new material is both improperly brought before this Court and tends to mislead this Court into believing that the opinion below, and the cases cited, *supra*, made incorrect characterizations of California's property tax.

III

THE INTRODUCTION OF NEW FACTS AND NEW ISSUES AT THIS TIME IS BOTH PREJUDICIAL AND IMPROPER

All of the considerations set forth above should have been fully explored below if the appellants desired to bring the matter of the use of property tax revenues before this Court.

Testimony from budget and economic experts was in order. Such exploration would have allowed the California courts to make appropriate adjustments should some inequity have been discovered.

Exploration of this new issue at this stage is barred by principles enunciated by this Court.

This Court has stated it is not appropriate for it to assume a role in a controversy until the state courts have had a full opportunity to resolve the problem. (Beck v. Washington, 369 U.S. 541, 8 L.Ed.2d 918, 82 S.Ct. 955 (1962); Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969).) This rule seems particularly appropriate when the new issue involves the consideration of totally new facts.

Even when the facts are fully explored below, this Court does not usually attempt to reexamine them. (Berenyi v. Immigration Director, 385 U.S. 630, 635, 17 L.Ed.2d 656, 87 S.Ct. 666 (1967).) Here the "facts" presented by the appellants were never raised, nor was any exception taken to the state appellate or supreme court interpretations.

Finally, a state court's construction of state law is conclusive on the Supreme Court of the United States (see Standard Oil Co. of California v. Johnson, 316 U.S. 479, 483, 86 L.Ed. 1611, 62 S.Ct. 1168 (1941).

Appellants claim that the portions of various reports they present are subject to judicial notice (see NLRB v. E. C. Atkins & Co., 331 U.S. 398, 91 L.Ed. 1563, 67 S.Ct. 1265 (1947)). But the case they rely on (as well as the case relied on by NLRB v. E. C. Atkins, supra), involved amplification or amendments to

information which was submitted to the lower courts (see Standard Oil Co. of California v. Johnson, supra).

These official orders are a far cry from the report of a state official such as that presented here which are not subject to judicial notice. (First National Bank of Wellington v. Chapman, 173 U.S. 205, 217, 43 L.Ed. 669, 674, 19 S.Ct. 407 (1899).)

By their silence the appellants have effectively cut off full consideration of the issue they attempt to raise here. They relied on the California Supreme Court's decision in Scandanavian Airlines System v. County of Los Angeles, 56 Cal.2d 11, 14 Cal.Rptr. 25, 363 P.2d 25 (1961).

But on at least four occasions, the appellants had ample warning that Scandanavian Airlines System (hereafter SAS) was not going to provide the protection they desired.

1. On November 8, 1974, the California Supreme Court rendered its opinion in Sea-Land Service, Inc. v. County of Alameda, 12 Cal.3d 772, 117 Cal.Rptr. 448, 528 P.2d 56. That case involved U.S.-owned cargo containers travelling in both interstate and foreign commerce (see Braniff Airways v. Nebraska Board, 347 U.S. 590, 98 L.Ed. 967, 74 S.Ct. 757 (1954)). Sea-Land dealt with virtually all of the issues raised below in this case. (12 Cal.3d 786-788.) Among counsel for the appellants in this case are Sea-Land's counsel in the Sea-Land case. The Sea-Land decision was rendered well before the appellate court rendered its opinion (but after the Superior Court had made its decision). The appellants introduced the new tonnage clause issue,

but not the one they raise here.

2. The appellants brought a similar action for the one year after those in question here, but after the decision in Sea-Land. The Superior Court judge, ruling on virtually identical facts, held that SAS was no longer the protection the appellants thought it was. The intended decision is attached as Exhibit "A." Thus, the appellants were warned for a second time before the Appellate Court heard this case.

3. The California Appellate Court reversed the Superior Court decision in this case in 1976, relying on both the Sea-Land opinion and the Traynor dissent in SAS. The Supreme Court characterized the property tax as paying for "the constant use of many services provided by the state. . . ." and listed fire and police protection and roads as only some of the examples. Neither the Appellants' Petition for Rehearing to the Appellate Court nor the Petition for Hearing to the State Supreme Court contain one mention of dispute with this proposition.

4. Finally, the California Supreme Court rendered essentially the same decision as the Appellate Court. The Appellants filed a Petition for Rehearing and alluded to facts not considered before. Nevertheless, the appellants never once alluded to the new facts and issues they now raise. (Of course, the argument above shows that this new issue is without merit.)

Thus, the appellants are attempting to raise a new issue supported by new facts without giving the appellees any meaningful opportunity to adequately litigate them. But the facts set forth above are enough to show that the new facts are not correct. Both the inadequacy of the evidence presented and the raising of a new issue at this time should lead this Court to reject consideration of this new material and to accept the state court's interpretation.

IV

THE APPELLEES' MOTIONS SHOULD BE GRANTED BECAUSE THE OPINION BELOW WAS CORRECT

The California Supreme Court has properly decided that the home-port doctrine is inapplicable and that no treaty prohibits the imposition of the tax in question.

The home-port doctrine was derived from Hays v. Pacific Mail Steamship Line, 58 U.S. (17 How.) 596, 15 L.Ed. 254 (1855) and is a rule of situs of property subject to a full ad valorem tax on each piece of property in the taxing jurisdiction. It is not applicable to property which is rotated in and out of the jurisdiction so that the same number of pieces of property are present throughout the tax year. (Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 35 L.Ed. 613, 11 S.Ct. 876 (1891).) The "continuing presence" of the property is in actuality what is being taxed since that presence is continually maintained throughout the year.

The only contention made by the appellants below is that the above rule, now firmly established for property moving interstate, is not applicable because the property in this case is owned by a foreign company. No inherent difference follows from such ownership. As Elihu Root stated in the Basis of Protection to Citizens Residing Abroad, 4 Proc. Am. Soc. Int'l. L. 16:

> "Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less. . . ."

The appellants assert that because foreign countries may tax differently than we tax, the state should not be able to tax at all. Obviously, the argument goes too far. The power of foreign governments to lay any sort of levy on any property coming within its jurisdiction is apparent. But that power cannot and should not constitutionally prohibit a tax on that same property by the United States or any of the states. Such logic will simply call for commerce clause prohibition of <u>any</u> levy on any enterprise doing business in a foreign country. The effect of the appellants' contentions is to oblige United States governments to exempt property because a foreign government imposes a tax which is unconstitutional in the United States.

In essence the appellants suggest either by treaty or the constitution that there is a law of the United States to the effect that whenever a foreign country taxes its own international enterprises, we cannot tax them.

The treaty interpretation proposed by the appellants is to the effect that should a foreign country not impose a certain kind of tax on American enterprises, Amermican governments are automatically prohibited from imposing that kind of tax on the foreign country's enterprises operating here. Such interpretations, assumes that the United States has given up enormous powers indeed. A Swedish property tax on American property netting $5,000.00 per year can be given up in order to force American governments to give up their property taxes on Swedish property yielding $5,000,000.00. At the same time, Sweden, operating on the basis of complete sovereignty in in the central government, can fund its property-related services from other taxes on American enterprises, while America's federal system is much more complex. No such ability of foreign government should be read into either the Constitution or treaties of the United States.

Implicit in the appellants' position is that Congress has the authority to regulate and/or prohibit any state taxes. It is clear that this was not the intent of the framers of the Constitution (see Federalist Papers No. 32). Nor is it supported by <u>Gibbons v. Ogden</u>, 22 U.S. (9 Wheat.) 1, 202-203, 6 L.Ed. 23 (1824).

The Federalist Papers deal with the issue in the most forthright terms. As Alexander Hamilton put it, the States,

> ". . . possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. . . . And . . . an attempt on the part of the National Government to abridge them in the exercise of it would be a violent assumption of power unwarranted by

any article or clause of its Constitution."
(Federalist Papers No. 32.)

Two state supreme courts have spoken on the issue of the taxability of foreign-owned instrumentalities engaged in foreign commerce. The Washington Supreme Court had occasion to review the imposition of a property tax on railroad cars owned by Canadian Pacific and operating between Canada and the United States. In its decision in Canadian Pacific Railroad v. King County, 90 Wash. 38, 155 P.2d 416 (1916), the court ruled that foreign railroad cars were not subject to a different rule because of their ownership. The court applied the rules previously applied to railroad cars (and other instrumentalities) used interstate (see Pullman's Palace Car Co. v. Pennsylvania, supra).

In California, the appellate court ruled consistently with the Washington Supreme Court in Scandanavian Airlines Systems v. County of Los Angeles, 6 Cal. Rptr. 694. But the majority of the California Supreme Court disagreed, placing principal reliance upon the home port doctrine's application to instrumentalities in foreign commerce (Scandanavian Airlines System v. County of Los Angeles, supra). The State Court reversed its position in Sea-Land Services, Inc. v. County of Alameda, supra, relying heavily upon the Traynor dissent in SAS. Thus, the Washington and California Supreme Courts have spoken together on this issue. The decision below merely carries out the previous decisions. Even the repercussions of an effect on foreign commerce was treated in Sea-Land (12 Cal. 3d at pp. 787-789, 117 Cal. Rptr. at pp. 458-460, 528 P.2d at pp. 66-68).

As a result the treatment of foreign and domestic enterprises is uniform. No competitive

advantage is given to one over the other, and the Federal Government can completely regulate the delicate balance between foreign and domestic goods. To assert otherwise is not only to reject the notions of equality which our nation fosters, but to frustrate every attempt to "fine tune" our relations with foreign governments at the federal level.

CONCLUSION

The decision below should be affirmed or this appeal should be dismissed. The appellees respectfully so move.

Respectfully submitted,

JOHN H. LARSON
County Counsel

JAMES DEXTER CLARK
Deputy County Counsel

Counsel for Appellees

OFFICE OF COUNTY COUNSEL
RECEIVED
MAR 2 1976
ASSIGNED TO

DEPT SOUTH "G"

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date March 1, 1976
HONORABLE ROY J. BROWN JUDGE
A. VILLA Deputy Sheriff
A. KAWASHIMA Deputy Clerk
NONE Reporter
(Parties and counsel checked if present)

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SO C 38911

JAPAN LINES, LTD., et al

vs.

COUNTY OF LOS ANGELES, et al

Counsel for Plaintiff: GRAHAM & JAMES by: Reed Williams

Counsel for Defendant: JOHN LARSON, County Counsel by: James Dexter Clark, Deputy

NATURE OF PROCEEDINGS: NON-JURY TRIAL (A/O CIVIL)

Cont 1st disp S/ c

This cause having come on regularly for trial on December 12, 1975, the parties having stipulated that the cause be tried upon the facts embraced within their stipulation and that the same be submitted upon such facts and the briefs then on file, and the cause having been thereafter argued and submitted, the Court now renders its decision as follows:

That judgment be entered that the plaintiff take nothing by his complaint and that the defendant be hence dismissed, the defendant to recover its costs.

I believe that the case of Sea-Land Service, Inc. v. County of Oakland, 12 C.3d 772, must be considered as determinative of the issues presented in this case. The facts here are not significantly different from those in Sea-Land. The only factual differences that relate to substance are (1) the owner of the containers in Sea-Land was a domiciliary of a sister state whereas, in this case, the owner is a domiciliary of the Japanese Empire; and (2) in Sea-Land 15% of the container usage was for the interstate transportation of goods and 85% of the usage was for the importing and exporting of goods from or to foreign nations. When viewed in the light of the reasoning of the Sea-Land court, these differences are believed to be unimportant details.

(where increase 100% of [illegible] usage over 85% foreign commerce)

Distilled to its essence the decision in Sea-Land is simply that the "homeport" rule does not afford exemption to an instrumentality of foreign commerce from nondomiciliary taxation if that instrumentality's contact with the nondomiciliary state is so insubstantial as to preclude it from acquiring taxable situs under due process of law concepts. This holding is thought to have been clearly expressed by the Sea-Land court when, in distinguishing the principles applicable to the facts before it from those that governed the decision in Scandinavian Airlines System, Inc. v. County of Los Angeles, 56 C.2d 11, the Court said,

".... the aircraft in SAS had only minimum contacts with Los Angeles, each landing there only eight times per year, while the containers herein have a daily contact with Alameda County and the City of Oakland and have obtained a

(Continued on page two)

DEPT SO"G"

MINUTES ENTERED
3/1/76
COUNTY CLERK

MINUTE ORDER

DEPT SOUTH "G"

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date March 1, 1976
HONORABLE ROY J. BROWN JUDGE
A. VILLA Deputy Sheriff
A. KAWASHIMA Deputy Clerk
NONE Reporter
(Parties and counsel checked if present)

5A

SO C 38911

JAPAN LINES, LTD., et al

vs.

COUNTY OF LOS ANGELES, ET al

Counsel for Plaintiff

Counsel for Defendant

NATURE OF PROCEEDINGS

Page Two - (Continued)

taxable situs other than their homeport by such permanency of location and use within the taxing jurisdiction.

".... therefore, we are not inhibited by SAS from concluding that the homeport doctrine does not shield the property of a taxpayer from a fairly apportioned ad valorem tax levied by a nondomiciliary jurisdiction with which the taxpayer has sufficient contacts, even if the taxpayer is engaged in foreign commerce or interstate commerce via international waters. The principles of apportioned taxation enunciated in Pullman, Ott, and Braniff are to be applied to instrumentalities so engaged."

In later parts of the decision the Court rather neatly parried the argument of Sea-Land that adherence to the homeport rule was necessary in order to the simultaneous assessment of taxes upon an instrumentality of either or both foreign or interstate commerce by more than one jurisdiction:

"merely because a state court is without jurisdiction to compel independent nations to adopt a uniform nondiscriminatory system of taxation, 'it does not follow that the states must forego the power to impose taxes that are not in themselves discriminatory'.

".... Thus the threat of double taxation from foreign taxing authorities has no role in commerce clause considerations of multiple burdens. Indeed, it is gratuitous to suggest that a state is alleviating any threat of multiple burdens by limiting its own taxing power, when foreign nations may tax instrumentalities of commerce that touch their jurisdiction at any rate they choose. The commerce clause mandates apportionment among the

(Continued on page three)

DEPT SO"G"

MINUTES ENTERED
3/1/76
COUNTY CLERK

MINUTE ORDER

DEPT SOUTH "G"

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date March 1, 1976

HONORABLE ROY J. BROWN JUDGE

A. VILLA Deputy Sheriff

A. KAWASHIMA Deputy Clerk

NONE Reporter

Parties and counsel checked if present

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SO C 38911

JAPAN LINES, LTD., et al

vs.

COUNTY OF LOS ANGELES, et al

Counsel for Plaintiff

Counsel for Defendant

NATURE OF PROCEEDINGS

Page Three - (Continued)

> several states in order to avoid discriminatory burdens on interstate or foreign commerce. But apportionment among nations is a matter for international agreement; it should not be considered as a limitation on a state's power to tax."

Counsel for defendant is directed to submit a proposed judgment in accordance with the foregoing.

Counsel notified by U.S. mail this date.

Certificate of mailing executed and filed this date.

DEPT SO"G"

MINUTES ENTERED
3/1/76
COUNTY CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

v.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL OR AFFIRM THE JUDGMENT BELOW

Peter L. Briger, Esq.
BRIGER & ASSOCIATES
299 Park Avenue
New York, New York 10017
(212) 758-4000

Sheldon S. Cohen, Esq.,
COHEN & URETZ
1775 K Street, N.W.
Washington, D.C. 20006
(202) 293-4740

Reed M. Williams, Esq.,
Ronald L. Young, Esq.,
GRAHAM & JAMES
100 Oceangate, Suite 515
Long Beach, Calif. 90802
(213) 435-4435

Counsel for Appellants

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL OR AFFIRM THE JUDGMENT BELOW

The arguments presented by the Appellees, in the hope of avoiding review of the instant case by this Court, do not in any manner diminish the importance of the Federal questions presented herein. Appellees' Motion to Dismiss Appeal or Affirm the Judgment Below (hereinafter referred to as the "Appellees' Motion") should be denied on the ground that substantial Federal questions are presented for review by this Court as more specifically described in Appellants' Jurisdictional Statement. Moreover,

Appellees' Motion must be denied on the additional grounds that:

1. This case is properly before the Court on appeal pursuant to 28 U.S.C. 1257(2);
2. The decision of the Supreme Court of the State of California is erroneous as a matter of law and, at least with respect to the "home port" doctrine, is likely to result in forum shopping between Federal and state courts within the State of California; and
3. The imposition of any state or local tax is subject to, and must be consistent with, the Commerce Clause of the United States Constitution and treaties which the United States has entered into.

Lastly, the issues in this case should be reviewed due to the fact that it presents an opportunity for clarification of the extent to which the Court's recent decision in *Department of Revenue* v. *Association of Washington Stevedoring Companies*, 46 U.S.L.W. 4363 (April 26, 1978) applies to foreign commerce in those circumstances where there exists: (i) the burden of double, and possibly multiple, taxation; and (ii) the prospect of the imposition of retaliatory taxes against U.S.-owned shipping companies and other carriers.

ARGUMENT

I.

An appeal is appropriate in this case.

It is argued in Appellees' Motion that this case should not be heard by the Court pursuant to the appeal procedure as set forth in 28 U.S.C. §1257(2). Rather, Appellees contend that Appellants should have proceeded by way of *certiorari* pursuant to 28 U.S.C. §1257(3). Appellees' unsupported argument is in error.

The question in the instant case concerns the validity of the tax imposed by Appellees under the Constitution of the United States (hereinafter referred to as the "Constitution") and various treaties. The questions involved in this case were set forth by the Supreme Court of the State of California as follows:

> "The sole question presented by this appeal upon an agreed statement from a tax refund judgment is whether appellants, the County of Los Angeles and the City of Los Angeles, may impose an apportioned ad valorem tax upon cargo shipping containers, taxed in Japan, used here essentially exclusively in foreign commerce and owned and controlled by Japanese taxpayers."
>
> 141 Cal. Rptr. 905 at 907.

> "The initial position of the taxpayers on this appeal was that under both the home-port doctrine and the most favored nation provisions of the 1953 treaty between the United States and Japan their containers are not subject to taxation by any jurisdiction except Japan . . ."
>
> 141 Cal. Rptr. 905 at 907.

"... They there argued that the property taxes at issue constitute indirect tonnage duties prohibited by Article I, section 10, clause 3 of the United States Constitution and, in support of one of their initial contentions that these taxes are also prohibited by applicable treaties ..."

141 Cal. Rptr. 905 at 908.

In rendering its decision, the Supreme Court of the State of California made a number of statements, which establish that clearly it considered the repugnance of the tax in relation to the Constitution, including the following:

"Sea-Land is fully dispositive of the commerce and Federal exclusivity issues raised in the case at bench."

141 Cal. Rptr. 905 at 909.

"The taxpayers contend that this prohibition invalidates the local property taxes at issue since they in practical effect are tonnage duties upon the cargo containers."

141 Cal. Rptr. 905 at 909.

"The taxpayers contend that the local taxation at issue violates certain treaty obligations of the United States and is therefore invalid under the supremacy clause of the United States Constitution ..."

141 Cal. Rptr. 905 at 910.

The arguments raised by the Appellants in the courts below are sufficient to invoke the jurisdiction of this Court pursuant to the appeal procedure. For purposes of invoking the Court's jurisdiction pursuant to 28 U.S.C. §1257(2), it is necessary merely to have argued below that the property tax cannot be imposed consistently with the Constitution, treaties or Federal law. *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965); *Warren Trading Post Co.* v. *Arizona Tax Commission,* 380 U.S. 685 (1965); *Railway Express Agency* v. *Virginia,* 347 U.S. 359 (1954).

In view of the foregoing, Appellees' contention must be rejected. If, however, an appeal is not deemed to be the proper mode of requesting jurisdiction, Appellants respectfully request that this appeal be considered as a petition for *certiorari.*

II.

The California Supreme Court erroneously concluded that the home port doctrine is not applicable.

Appellees have insisted, throughout this proceeding, that the "home port" doctrine is not applicable to property used in foreign commerce. This conclusion has been supported on the basis of this Court's decisions regarding interstate commerce and the decision in *Canadian Pacific Railroad* v. *King County,* 90 Wash. 38, 155 P.2d 416 (1916).

There is no question that the "home port" doctrine retains its vitality. In fact, at least one court within the State of California has noted that the "home port" doctrine is valid as applied to foreign commerce. It is ironic that in *Continental Dredging Company* v. *County of Los Angeles,* 366 F. Supp. 1133 (D.C. Cal. 1973), a case in which Appellees' counsel both participated, the Federal District Court for the Central District of California observed that:

"The home-port rule originally provided that the taxable situs of ocean-going vessels was exclusively within the domicile of the owners thereof and the place of registration. *Hays* v. *Pacific Mail Steamship Co.,* 58

U.S. 596, 17 How. 596, 15 L.Ed. 254 (1854). *Hays* involved ships in interstate commerce but the rule stated in *Hays* applies to foreign commerce as well. Subsequent decisions have eroded the rule with respect to interstate commerce only, now providing for local taxation on an apportioned basis in many circumstances. See dicta in *Scandinavian Airlines* v. *County of Los Angeles,* 56 Cal.2d 11, 14 Cal.Rptr. 25, at 29-34, 363 P.2d 25 (1961), where the Court held that a two-day stopover was insufficient to alter foreign situs. *Although the theories supporting the home-port rule have shifted over the years (see Scandinavian, supra, at 32, 363 P.2d 25, commerce clause, due process clause, supremacy clause), the rule itself with respect to foreign commerce remains intact.*

(Emphasis added.) 366 F.Supp. at 1139.

The decision in *Continental Dredging Company* underscores the need for review of the instant case. It is clear that, under the authority of *Continental Dredging Company,* potential litigants are likely to have a distinct advantage in the Federal courts which have not ascribed to the unwarranted extension of property tax jurisdiction in the State of California. The continuance of such a dichotomy could well lead to "forum shopping." Therefore, this case presents a substantial Federal question which should be reviewed by the Court.

III.

A limitation on the imposition of tax upon instrumentalities of foreign commerce does not constitute unwarranted limitation of state taxation.

Appellees argue that under the Constitution the states have the uncontrolled right to raise revenues for their own needs. In support of this proposition, Appellees cite the Federalist Papers, No. 32. It is submitted that Appellees have misconstrued the rights of state governments to impose taxes upon foreign commerce and Appellants' arguments in relation thereto.

The cited portion of the Federalist Papers relied upon by Appellees does not address itself to the proper relationship between foreign commerce and the rights of state governments to impose a tax. Clearly, if there is any conflict between foreign commerce and the states' rights to impose a tax, the policies in favor of foreign commerce should prevail. The policy considerations to be applied in the case of foreign commerce are intrinsically more important than in the case of interstate commerce since they concern the nation as a whole in relation to foreign governments. Federalist Papers, No. 42 (Madison). *See, also,* Abel, *The Commerce Clause in the Constitutional Convention in Contemporary Comment,* 25 Minn. L.Rev. 432, 465 (1941). Thus, insofar as concerns foreign commerce, the states' rights to impose a tax is clearly secondary to the policies underlying free flow of commerce.

Appellees argue that the framers of the Constitution did not intend to regulate or prohibit any state taxes under the Commerce Clause. According to the Appellees, the impact of state and local taxation is a matter of local governmental discretion, notwithstanding the effect it may have upon the

relations of the United States with foreign nations. However, as explained by Chief Justice Marshall, the status of states within the realm of foreign commerce is as follows:

> "The states are unknown to foreign nations; their sovereignty exists only with relation to each other and to the general government, whatever regulations foreign commerce should be subjected to in the parts of the Union, the general government would be held responsible for them; and all other regulations but those which the Congress had imposed would be regarded by foreign nations as trespasses and violations of national faith and comity."
>
> *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 228 (1824).

The rationale of Chief Justice Marshall is directly applicable in the instant case. Appellees have, with the sanction of the Supreme Court of the State of California, elevated themselves in importance beyond the Federal government and asserted a position likely to create an impact and adverse ramifications beyond their own territorial limits. It should be noted that the State of Oregon, largely based upon the interpretation of the law enunciated by the Supreme Court of the State of California, has re-interpreted its own property tax law in a manner that would subject to tax foreign-owned containers used exclusively in foreign commerce. There is attached hereto as Exhibit A, a copy of an opinion dated January 31, 1978 of an Assistant Attorney General of the State of Oregon to this effect. Several of Appellants herein have been requested to file property tax returns by officials of Multnomah County, Oregon. This action clearly evidences the trend toward the proliferation of such taxes as referred to in Appellants' Jurisdictional Statement at p. 21. Therefore, this case

presents substantial Federal questions which must be reviewed by this Court.

IV.

This case presents important Federal questions which were not confronted in *Department of Revenue* v. *Association of Washington Stevedoring Companies*.

On April 26, 1978, this Court rendered its decision in *Department of Revenue* v. *Association of Washington Stevedoring Companies*, 46 U.S.L.W. 4363 (April 26, 1978), holding that a business and occupation tax imposed by the State of Washington with respect to stevedoring activities conducted entirely within the state is constitutional under the Commerce and Import-Export Clauses of the Constitution. The foregoing decision does not affect the question whether the instant case should be heard by the Court due to the fact that the tax imposed by Appellees: (i) conflicts with the purpose of the Import-Export clause to the extent that the taxes in the instant case constitute a restraint upon the Federal government in relation to foreign policy; (ii) disturb the harmonious relationship which exists between the states in relation to foreign commerce; and (iii) fails to effectuate a fair and just apportionment of taxes because, regardless of the manner in which the said tax is applied, Appellants have been subjected to double taxation.

The tax considered in *Association of Washington Stevedoring Companies* concerned business and occupation taxes imposed on the business of loading and unloading cargo ships, which activity was, in its entirety, conducted within the State of Washington. No foreign business or vessel was actually subjected to such tax. Based on these factors,

this Court held that the Commerce and Import-Export Clauses of the Constitution were not violated by the imposition of the tax.

The Court's decision with respect to the Commerce Clause was based upon three premises. First, the Court held that a tax imposed upon interstate commerce is not unconstitutional *per se*. In following the rationale established in *Complete Auto Transit Inc.* v. *Brady*, 430 U.S. 274 (1977), the Court held that the Commerce Clause does not relieve interstate commerce from its just share of state tax burdens. Second, the Court noted that the tax imposed by the State of Washington did not impose multiple tax burdens. Third, the Court reasoned that a state tax would be unconstitutional, pursuant to the Commerce Clause, only in an instance where the tax unfairly burdens commerce by exacting more than a fair share of tax upon the interstate activity. There was no suggestion in the facts brought before the Court, as well as in those brought before the lower courts, in the *Association of Washington Stevedoring Companies* case that the tax was not fairly related to services and protections provided by the state in relation to the activity conducted therein.

The facts in the instant case are in direct contrast with those in *Association of Washington Stevedoring Companies*. First, the instant case presents a situation wherein double tax burdens have resulted. As noted in the Appellants' Jurisdictional Statement, Appellants are foreign persons, the property of which is subject to full *ad valorem* property tax in Japan. Therefore, regardless of any allocation formula that may have been applied by Appellees, Appellants have been subject to a double tax burden. Second, the property taxes levied by Appellees do not bear a fair relation to the presence of the containers of Appellants within the jurisdiction of Appellees or the limited quantum of services or protection rendered by Appellees. The sole contact which Appellants' property maintains with such jurisdictions is limited to the passage of ocean-going shipping containers through such counties as an integral part of a shipment in foreign commerce. In this respect, the activity of Appellants is different from the activity conducted in *Association of Washington Stevedoring Companies*. In *Association of Washington Stevedoring Companies*, the activity involved was the rendering of local services on a continuous basis solely within the State of Washington. Third, as concerns the balancing of the needs of Appellees in relation to the activity of Appellants herein, it is submitted that the amount of tax imposed does not provide a fair relationship to the limited services and protections provided by the Appellees.

The Court also held, in the *Washington Stevedoring Companies* case, that the business and occupation tax involved therein did not contravene the policies of the Import-Export Clause. In reaching this conclusion, the Court summarized the purpose of the Import-Export Clause as enunciated in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976) in the following terms:

> "The framers of the Constitution thus sought to alleviate three main concerns . . . the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the states consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the states might be disturbed unless seaboard states, with their crucial ports of entry, were prohibited from levying taxes on citizens of other states by taxing goods

merely flowing through their ports to the other states not situated as favorably geographically."

423 U.S. at 285-6.
(Footnotes omitted).

The imposition of a business and occupation tax was deemed to be consistent with the policies of the Import-Export Clause principally due to the nature of the activity involved. First, the Court noted that the tax involved did not restrain the ability of the Federal government to conduct foreign policy. In reaching its conclusion, the Court stated that:

"The assessments in this case are only upon business conducted entirely within Washington. No foreign business or vessel is taxed."

(Emphasis added.)
46 U.S.L.W. at 4368.

Second, the Court held that the tax merely compensated the state for services and protection extended to the stevedoring business and the tax was not applied directly to the import of goods. Last, the Court held that the tax involved was applied to a taxpayer with a reasonable *nexus* to the state.

The considerations applied by the Court in *Association of Washington Stevedoring Companies* to sustain the validity of the tax under the Import-Export Clause must be reconsidered in view of the varied circumstances involved herein. First, Appellants are foreign entities, the principal places of business of which are located in Japan. The assessment is imposed upon an instrumentality of foreign commerce, which begins its voyage in a foreign country, such as Japan, and ends at some point in the United

States, or *vice versa*. In this connection, the assessment of tax in this case is upon businesses conducted exclusively in foreign commerce and almost in their entirety outside of the local jurisdiction that imposes the tax. The object of the tax is a foreign business and an instrumentality of foreign commerce. The United States Government has attempted to avoid the exaction of such taxes by means of the Customs Convention on Containers (20 U.S.T. 301, T.I.A.S. 6634), the General Agreement on Tariffs and Trade (61 Stat. [5], [6], T.I.A.S. 1700), and the Treaty of Friendship, Navigation and Commerce with Japan (4 U.S.T. 2063, T.I.A.S. 2863). Therefore, the imposition of a tax in this case constitutes an impediment upon the regulation of foreign trade by the United States.

As a second basis for holding that the Import-Export Clause was not violated as a result of the tax imposed in *Association of Washington Stevedoring Companies*, the Court noted that the object of the tax, the rendering of services, was somewhat attenuated from the imported goods themselves. In the instant case, the object of the tax is, in essence, the vessel that is carrying the goods or an integral part of such vessel. This Court clearly has stated in its decision in *Michelin* that property taxes imposed by coastal states could be avoided by importers through the use of such containers. 423 U.S. at 288-90. Therefore, the containers involved in this case are intrinsically interrelated with the goods involved to a much greater extent than were the stevedoring activities involved in the *Association of Washington Stevedoring Companies* case.

Moreover, the third consideration applied to the *Association of Washington Stevedoring Companies* case does not appear in the instant case. In the former case, it was clear that the taxpayer had a reasonable *nexus* with the

state imposing the tax. In the instant case, the only *nexus* between Appellants and the Appellees is that some of Appellants' containers pass through the territorial limits of Appellees and remain therein for transitory periods of time, such as several weeks, as an integral part of an uninterrupted shipment in foreign commerce. Moreover, the relationship between the tax imposed and the services actually rendered, in terms of police and fire protection as well as road construction and maintenance, is wholly disproportionate. Finally, it appears that the utilization of an "average presence" formula by Appellees is contrary to the provisions of Section 205, Title 18, California Administrative Code, which provides that before movable property will be considered to have a taxable *situs* in the taxing jurisdiction, such property must remain therein for a minimum period of time, a prerequisite which is not satisfied in the instant case. The same condition is imposed by the Customs Convention on Containers, 20 U.S.T. 301, T.I.A.S. 6634. Consequently, it is submitted that the property in question lacks a taxable *situs* within, and a reasonable relationship to, the territorial limits of Appellees.

Moreover, it should be noted that *Association of Washington Stevedoring Companies* did not present any questions concerning the Tonnage Duties Clause of the Constitution. The taxes in the instant case fall particularly within the prohibition established in the Tonnage Duties Clause inasmuch as an instrumentality of commerce is involved.

For the above mentioned reasons, this case presents a number of substantial Federal issues that were not considered in *Association of Washington Stevedoring Companies* and should be reviewed by the Court.

CONCLUSION

In view of the foregoing, Appellees' Motion should be denied and probable jurisdiction should be noted in order that plenary consideration, on the basis of briefs and oral argument, may be given to the questions presented herein.

Respectfully submitted,

Peter L. Briger, Esq.
Briger & Associates
299 Park Avenue
New York, New York 10017
(212) 758-4000

Sheldon S. Cohen, Esq.,
Cohen & Uretz
1775 K Street, N.W.
Washington, D.C. 20006
(202) 293-4740

Reed M. Williams, Esq.,
Ronald L. Young, Esq.,
Graham & James
100 Oceangate, Suite 515
Long Beach, Calif. 90802
(213) 435-4435

Counsel for Appellants

Exhibit A

DEPARTMENT OF JUSTICE
TAX DIVISION
104 State Office Building
Salem, Oregon 97320
Telephone: (803) 376-4494

January 31, 1978

Mr. Lindy Freeman
Division of Assessment & Taxation
Room 136
Multnomah County Courthouse
Portland, Oregon 97204

Re: Personal Property Tax on Cargo
Containers

Dear Mr. Freeman:

This opinion is in response to a question presented by your office concerning cargo containers.

QUESTION PRESENTED

Are cargo containers used in interstate and foreign commerce subject to personal property ad valorem tax assessment?

ANSWER GIVEN

Cargo containers continuously present in Multnomah County are not constitutionally immune from an apportioned personal property ad valorem tax. Neither do these cargo containers qualify for exemption under Oregon's freeport law, ORS 307.810.

Exhibit A

DISCUSSION

You have asked whether cargo containers used on container ships in interstate and foreign commerce can be assessed under the personal property ad valorem tax. Taxpayers have claimed that these containers are either immune under the protection of the United States Constitution or are exempt under Oregon's free port law.

To support their position of constitutional immunity, taxpayers have cited a decision by the Superior Court of California. *Japan Line, Ltd.* v. *County of Los Angeles,* 132 Cal Rptr 531 (L.A. County 1973). However, the Supreme Court of California recently reversed this superior court's decision. *Japan Line, Ltd.* v. *County of Los Angeles,* 141 Cal 905 (1977). The California Supreme Court held that an apportioned ad valorem tax on the cargo containers violated neither the Commerce Clause, the Import-Export Clause nor the Supremacy Clause of the United States Constitution. A copy of this recent decision and a copy of an earlier decision in *Sea-Land Service, Inc.* v. *County of Alameda,* 117 Cal2d 448, 528 P2d 56 (1974) are enclosed. Assuming that the cargo containers' presence in Multnomah County are similar to those in the California counties, these two cases clearly indicate that the cargo containers are subject to the ad valorem tax.

The taxpayers also contend that their cargo containers are exempt from ad valorem taxation under the Oregon free port law. However, ORS 307.810 grants an exemption only for

> "Personal property in transit through this state [that] is goods, wares and merchandise destined for sale in the ordinary course of trade or business. . . ."

Exhibit A

The cargo containers are used to transport personal property destined for sale in the ordinary course of the trade or business, but are not, themselves, destined for sale out of state. The Oregon free-port law was not intended to extend to containers used and reused transporting goods.

The two enclosed California decisions clearly hold that cargo containers used in interstate and foreign commerce are not immune under the United States Constitution from an apportioned ad valorem tax. In addition, the Oregon free port law does not extend its exemption protection to the containers. Consequently, the continuous presence of cargo containers in Multnomah County subjects them to an apportioned ad valorem tax.

Sincerely,

/s/ JAMES D. MANARY
James D. Manary
Assistant Attorney General

bem

cc: Walt Taylor
Personal Property Assessment

RECEIVED
MULTNOMAH COUNTY
FEB 02 1978
BRUCE G. LAWMAN
DIRECTOR, DIVISION OF
ASSESSMENT & TAXATION

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

v.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE APPELLANTS

PETER L. BRIGER
BRIGER & ASSOCIATES
299 Park Avenue
New York, New York 10017
(212) 758-4000

SHELDON S. COHEN
COHEN & URETZ
1775 K Street, N.W.
Washington, D.C. 20006
(202) 293-4740

REED M. WILLIAMS
RONALD L. YOUNG
GRAHAM & JAMES
100 Oceangate, Suite 515
Long Beach, California 90802
(213) 435-4435

Counsel for Appellants

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COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE APPELLANTS

Opening Statement

Appellants, six Japanese steamship companies (hereinafter referred to as the "Taxpayers") appeal from the decision of the Supreme Court of the State of California (hereinafter referred to as the "California Supreme Court") filed on November 18, 1977, rehearing denied, December 28, 1977. This decision upheld the imposition by Appellees (hereinafter referred to as the "Municipalities") of a personal property tax upon ocean-going cargo containers, owned by the Taxpayers, used exclusively in foreign commerce and having no fixed presence in the territorial limits of California.

In a decision rendered by the Honorable Hampton Hutton for the Superior Court, Los Angeles County (hereinafter referred to as the "Superior Court"), it was determined that the imposition of such tax was repugnant to the Constitution of the United States (hereinafter referred to as the "Constitution") and various treaty obligations of the United States. The Court of Appeal, Second Appellate District, of the State of California (hereinafter referred to as the "Court of Appeal") reversed the decision of the Superior Court on the ground that the Municipalities were not barred by either the Constitution or any of the various treaty obligations of the United States from imposing personal property tax upon the Taxpayers' containers. The California Supreme Court affirmed this decision and adopted the opinion of the Court of Appeal as its own.

The Taxpayers respectfully submit this brief to demonstrate that: (i) this Honorable Court has jurisdiction of the appeal; and (ii) the opinion of the California Supreme Court is erroneous as a matter of law and must be reversed.

Opinions Below

The opinion of the California Supreme Court is reported at 20 Cal. 3d 180, 141 Cal. Rptr. 905, 571 P. 2d 254 (1977). The opinion of the Court of Appeal is reported at 61 Cal. App. 3d 562, 132 Cal. Rptr. 531 (1976). The opinion of the Honorable Hampton Hutton of the Superior Court was not officially reported. (The opinions below are reprinted at App.,[1] pp. 21-24 and 43-64.)

[1] All references to the term "App." herein refer to pages in the Appendix filed herein, pursuant to Rule 40 (1)(e).

Jurisdiction

The jurisdiction of the Court to review the decision below on appeal is conferred by 28 U.S.C. §1257(2) which provides as follows:

> "Final judgments or decrees rendered by the highest court of the state, in which a decision may be had, may be reviewed by the Supreme Court . . . by appeal, where there is drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

A timely request for appellate review was made to the Court by the Taxpayers. The Notice of Appeal was filed with the California Supreme Court on February 28, 1978. The Taxpayers filed their Jurisdictional Statement with the Court on March 28, 1978. On June 12, 1978, the Court postponed further consideration of the question of jurisdiction until the full briefing and hearing of the case on the merits. The jurisdiction of the Court to review this case is argued at pages 12 to 14 hereof.

Statutory, Constitutional and Treaty Provisions Involved

The relevant statutory, constitutional and treaty provisions involved in this case are set forth at pages 1a through 10a hereof.

Question Presented

The question presented is whether the imposition of personal property taxes on foreign-owned, ocean-going con-

tainers, used exclusively in foreign commerce and present within the territorial limits of the Municipalities for only limited periods of time and continually in transit, is repugnant to the following provisions of the Constitution: (i) Article I, Section 8, Clause 3 (the Commerce Clause); (ii) Article II, Section 2, Clause 2 (the Treaty Power Clause); (iii) Article VI, Clause 2 (the Supremacy Clause); (iv) Article I, Section 10, Clause 3 (the Tonnage Duty Clause); (v) Article I, Section 10, Clause 2 (the Import-Export Clause); (vi) the Fourteenth Amendment, Section 1 (the Due Process Clause) as well as the following treaty obligations or Executive agreements: (i) Chapter I, Article I(a) and Chapter II, Article 2 of the Customs Convention on Containers, 20 U.S.T. 301, T.I.A.S. 6634 (hereinafter referred to as the "Container Convention"); (ii) Articles XI(1) and (4) and Article XXII(2) of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. 2863 (hereinafter referred to as the "FCN Treaty with Japan"); and (iii) Article III, paragraphs 1 and 2 of the General Agreement on Tariffs and Trade, 61 Stat. [5], [6], T.I.A.S. 1700 (hereinafter referred to as the "GATT").

I.

Statement

The Taxpayers are six corporations established and existing under the laws of Japan. (Statement in Lieu of Clerk's and Reporter's Transcripts (hereinafter referred to as the "Statement"), ¶ 15, App. 31.) They are engaged, *inter alia*, in the ocean transport of cargo between Japan and the United States, as well as third countries. (Statement, ¶¶ 5, 6, 16, App. 30-31.) Each of the Taxpayers maintains its principal place of business and commercial dom-

icile in Japan. (Statement, ¶ 15, App. 31.) Commencing in the late 1960's, the Taxpayers began to transport cargo between Japan and the United States by means of ocean-going containers, carried upon vessels specially designed and constructed to carry such containers. (Statement, ¶ 18, App. 31.) The vessels utilized by the Taxpayers were of such a type and design that they could function on a commercially feasible basis only when laden with a complement of containers. *Id.*

The utilization of containers is a recent and important technological advance in the ocean transport of cargo. Aside from reducing the actual cost of transportation through greater efficiency, the use of such containers greatly decreases the risk of damage through theft or fire and thereby decreases the need for police and fire protection at local ports.

All of the vessels of the Taxpayers, on which the subject containers are carried, are registered and maintain their "home port" in Japan. (Statement, ¶ 16, App. 31.) During the tax years 1970, 1971 and 1972[2] the Taxpayers, in connection with their containerized transport of cargo in foreign commerce, used ports located within the Municipalities. (Statement, ¶ 1, App. 29.) The Taxpayers did not maintain on a permanent basis any particular containers within the Municipalities during the periods in issue. (Statement, ¶ 14, App. 31.) The average stay of any of the containers therein at any one time was less than three weeks. (Statement, ¶ 13, App. 31.) None of the con-

[2] Under California law, a property tax year commences on the first day of July of each year. However, the tax is applicable to all property within the taxing jurisdiction on the preceding first day of March, which is commonly referred to as the "lien date". Cal. Rev. and Tax Code, §§401.3 and 2192.

tainers present in the Municipalities on the relevant dates had been present in California for as much as six of the twelve months immediately preceding the aforesaid lien date. (Statement, ¶ 12, App. 31.) The containers passed through the Municipalities as an integral part of the foreign transport of cargo and were used exclusively in foreign commerce. (Statement, ¶ 5, App. 30.) The containers were never used for the intrastate or interstate transportation of cargo. (Statement, ¶ 6, App. 30.)

Pursuant to 19 C.F.R. §10.41a(a)(1),[3] containers are required to be released by the Customs Service without the payment of a customs duty and to be treated as not having entered the United States. The exemption from duty and entry is conditioned upon the undertaking that the containers are not to be used in interstate or intrastate commerce. Such undertaking is secured by the posting with the Customs Service of a bond.

Pursuant to an "average presence" fiction, not authorized by section 201 of the California Revenue and Tax Code or any other statutory provision and contrary to the specific mandate of 18 California Administrative Code §205, relating to the taxable *situs* of movable property, the Taxpayers were considered to have actually maintained a certain fixed number of containers upon a permanent basis within the Municipalities on the lien dates in issue. A personal property tax was imposed on the basis that a portion of the containers were considered to be present within the jurisdiction on a continuous basis.

The tax imposed is a general levy which is used to fund any and all public needs, without regard to the provision of any specific service to the particular Taxpayers

[3] 19 C.F.R. § 10.41a(a)(1) is set forth on page 10a hereof.

herein or the class of persons constituting the shipping industry.[4] The level of property tax is grossly disproportionate to the value of services potentially available to the Taxpayers. By way of example, there is set forth below a list of the various tax agencies entitled to receive a portion of the property tax imposed by one of the Municipalities, as well as the proportion of such tax earmarked as attributable to that taxing agency, all as reflected in the notice of assessment issued to the Taxpayers:[5]

"*Taxing Agency*	*Rate* [%]
Los Angeles	2.5157
County	4.0882
Unified Schools	4.7952
Junior College	.4489
Flood Control	.3552
Water Replenish [sic]	.0012
Water Agencies	.1700
Mosquito Abate [sic]	.0057
Total	12.3801"

[4] The Taxpayers make a number of arguments based upon factors which it is submitted this Court can recognize as a matter of judicial notice. *See*, *N.L.R.B.* v. *E.C. Atkins & Co.*, 331 U.S. 398, 406, fn.2 (1946). *See also*, *Colonial Airlines* v. *Jonas*, 202 F.2d 914, 919, fn.1 (2d Cir. 1953); *and United States* v. *Holmes*, 414 F. Supp. 831, fn.3 (D. Md. 1976). The case is unique in several aspects because the decision of the California Supreme Court had a domino effect which precipitated many actions on the part of foreign governments that directly evidence impact upon foreign relations and the significant interest of the Federal Government. Moreover, the economic data cited herein is a matter of public record.

[5] The notice of assessment was submitted by the County of Los Angeles and a representative copy is attached hereto as Exhibit "A".

The foregoing rates are applied, in each instance, to the assessed value of the Taxpayers' property. Ordinarily, the assessed value of the property is equal to 25 percent of the market value of the property.[6]

The published reports relating to revenues (including tax collections) and expenditures of the Municipalities during the years in issue indicate that less than two to three percent of the total revenues of the Municipalities could in any way be considered as providing any potential measure of support, benefit or protection to the Taxpayers herein in terms of police protection and fire protection, road construction and maintenance. (Appendix to Jurisdictional Statement, 36a-47a). Copies of the relevant portions of the Annual Reports published by the Los Angeles Harbor for the years 1970-71 and 1971-72 are attached hereto as Exhibits "B" and "C" respectively.

The expenditures incurred by the Municipalities in the maintenance of the port facilities used by the Taxpayers are recovered through two types of specific charges imposed upon the user of port facilities. First, the owner of the vessel is required to pay a dockage charge for the privilege of mooring the vessel. Second, the owner of cargo passing through the harbor is required to pay a wharfage charge for goods passing over the wharf. These charges are used to pay the costs of the port facility, including the costs of police protection, road service and, in some instances, fire protection. For instance, the Port of Long Beach maintains its own security force and operates its own fireboats. The income of the Harbor Fund at least in the County of Los Angeles during the years in issue has exceeded expenditures incurred in connection with provision of harbor services.

[6] Cal. Rev. and Tax Code, §401.

Instead of using public harbor facilities, incoming vessels may rent their own terminal from the port authority. Four of the Taxpayers rented a terminal from one of the Municipalities. In addition to the rent paid, these Taxpayers were charged a special tax imposed upon the value of their leasehold interests, designated as a "possessory interest tax."

The containers are also subject to indirect taxes imposed upon trucks while they are transported from the port facility to their respective destinations. These taxes include gasoline tax, registration fees with respect to trucks and similar levies intended to cover the cost of road construction and maintenance.[7]

All containers of the Taxpayers have been subjected to full *ad valorem* property taxation in Japan, including those subjected to California property tax by the Municipalities. (Statement, ¶ 22, App. 32.) The Taxpayers timely paid such taxes and no portion thereof has been refunded. (Statement, ¶ 2, 23, App. 30, 32.) Containers, owned or used by United States shipping companies, were never subjected to property taxation in Japan, even though temporarily present in Japan for the receipt or delivery of cargo or awaiting transport by vessel. (Statement, ¶ 25, App. 32.) To eliminate the incidence of multiple taxation upon vessels (including containers used in connection therewith) engaged in foreign commerce, Japan applies the equivalent of a "Home Port" doctrine. (Statement, ¶ 25, App. 32.)

All other governments with which the United States maintains trading relationships have taken steps, through a variety of means, to assure that foreign-owned containers,

[7] *See e.g.*, Cal. Rev. and Tax Code, Part 2 (§§ 7301-8404) and Part 3 (§§ 8601-9335).

used exclusively in foreign commerce and present in the foreign country only for temporary periods of time, are exempt from local property taxation. Some countries, such as Japan, impose property taxes upon the equivalent of a "Home Port" doctrine. Other countries exempt foreign-owned containers, provided that they are present therein for only some limited period during the year. Other countries either totally exempt containers from taxation, do not impose such taxes or provide an exemption for foreign-owned containers provided that a reciprocal exemption is extended by the country of the foreign owner.

On February 17, 1978, representatives of the Government of Japan conferred with the United States Department of State (hereinafter referred to as the "State Department") to express concern over the imposition by California of property taxes upon the containers of the Taxpayers. An *aide memoire* confirming such concern was delivered by the Government of Japan to the State Department on March 27, 1978. (Appendix to Jurisdictional Statement, 50a.)

The imposition of California property tax has also prompted protests from other nations. The Governments of Denmark, France, Finland, the United Kingdom, jointly with the Government of the Netherlands, informed the State Department in a letter dated May 16, 1978, that they shared the concern expressed by the Government of Japan regarding the imposition of personal property tax upon foreign-owned containers. *See,* Exhibit "D" hereto. This letter also stated that proliferation of personal property tax in accordance with the example set by the Municipalities is viewed "with considerable apprehension." The Federal Republic of Germany also submitted a letter to the State Department which expressed concurrence with the views of the Japanese and Netherlands Governments. *See,* Exhibit "E" hereto. On July 25, 1978, the Government of Norway

delivered to the State Department a letter expressing similar concerns. *See,* Exhibit "F" hereto.

The California State Board of Equalization on March 24, 1978, proposed an amendment to California law that would permit imposition of personal property tax upon aircraft owned by foreign persons and used exclusively in foreign commerce. *See,* Exhibit "G" hereto. On June 15, 1978, the Government of Mexico filed a letter with the State Department to protest such action and noted that the abandonment of the principle of reciprocal exemption could immediately lead to taxation of United States-owned aircraft and that no one would stand to gain from such escalation of taxation. *See,* Exhibit "H" hereto. The Federal Republic of Germany filed a similar letter. *See,* Exhibit "I" hereto. Additional letters of protest were filed by the following Governments: Canada, Denmark, France, Japan, the Netherlands, New Zealand, Norway, Sweden and the United Kingdom, copies of which are attached hereto as Exhibits "J" through "P", respectively.

Pursuant to the opinion dated January 31, 1978, of the Oregon Department of Justice, the State of Oregon reversed its position and decided that personal property tax can lawfully be imposed upon ocean-going containers within Oregon. *See,* Exhibit "Q" hereto. Subsequently, the Taxpayers, as well as a number of other foreign shipping companies using port facilities within Multnomah County, Oregon, were required to file personal property tax returns with respect to containers present in the County as of the lien date. Taxes have now been assessed against the Taxpayers by Multnomah County, Oregon, on the basis of the containers actually present therein on the lien date.

When the instant appeal was filed with the Court, the California legislature was considering a bill to exempt

containers from the incidence of personal property tax. On April 17, 1978, the State Department submitted a letter to Governor Jerry Brown supporting the passage of the bill because it would lessen the likelihood of retaliatory taxation measure against United States persons engaged in ocean commerce. *See,* Exhibit "R" hereto. The proposed amendment to exempt containers from property tax has at this time been abandoned.

On June 12, 1978, the European Economic Community Council (hereinafter referred to as the "EEC") decided to study suitable countermeasures to take against non-member states the practices of which are detrimental to the maritime interests of member states. *See,* Exhibit "S" hereto.

II.

This Court Has Jurisdiction to Hear This Appeal

On March 28, 1978, the Taxpayers timely submitted a Jurisdictional Statement to invoke the appellate jurisdiction of the Court. In its order of June 12, 1978, the Court postponed further consideration of the question of jurisdiction until the briefing and hearing of the case on the merits. The Taxpayers respectfully submit that all of the elements required by 28 U.S.C. §1257(2) for the Court to exercise appellate jurisdiction are present in this case, namely:

1. The order of the California Supreme Court on December 28, 1977, denying the Taxpayers' petition for rehearing, is a "final judgment or decree" rendered by the highest court of the State of California in which a decision could be had. *Empresa Siderurgica* v. *County of Merced,* 337 U.S. 154 (1949); *and Market Street R. Co.* v. *Railroad Commission,* 324 U.S. 548, 551 (1945);

2. The decision of the California Supreme Court upholds the validity of a statute of the State of California. The Municipalities have asserted that the instant case involves a provision of the California Constitution and that review thereof is permitted through petition for *certiorari.* Motion to Dismiss or Affirm, p. 2. This contention is erroneous as a matter of record, which reflects that the Taxpayers questioned the imposition of tax pursuant to a state statute.[8] It is clear that, although the California Constitution enables extension by the legislature of taxation and the permissible objects thereof, it is a state statute, not the California Constitution, which authorizes the Municipalities to collect the tax. The California Constitution is not challenged since, in the absence of the statute, the tax could not be collected by the Municipalities;

3. The Taxpayers have argued from the inception of this case that the application of section 201, California Revenue and Taxation Code, in a manner which subjects their containers to property tax, is repugnant to the Constitution and various treaty obligations of the United States. Specifically, the validity of Section 201, California Revenue and Taxation Code, as relates to its imposition of California property tax on the subject containers, was initially called into question with commencement of this action by the Taxpayers (*See,* App., pp. 7, 13 and 19-20). Thereafter, the validity of this statute under the Constitution and treaty obligations of the United States has continually been at issue in this case. This Court has held that the validity of a state statute is sustained within the meaning of 28 U.S.C. §1257 (2) when a state court holds that the state statute applies to a particular set of facts, as against

[8] *See, App.* at 7, 13, and 19-20.

the argument that such an application is unconstitutional. *Cohen* v. *California,* 403 U.S. 15, 17-18 (1971); and

4. The fact that the state statute involved was interpreted and applied by the Municipalities, rather than a state authority, is not relevant to the jurisdiction of this Court. *Empresa Siderurgica, S.A.* v. *County of Merced,* 337 U.S. 154 (1949). The collection of tax by the City of Los Angeles and City of Long Beach involves the same statutory provisions as involved in the case of Los Angeles County. *See, e.g., Parrott & Co.* v. *City and County of San Francisco,* 280 P.2d 881 (Cal. App. 1955).

Decisions sustaining the jurisdiction of this Court to review the decision on appeal are: *Cohen* v. *California,* 403 U.S. 15, 17-18 (1971); *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 61 n.3 (1963); *Empresa Siderurgica* v. *County of Merced,* 337 U.S. 154, 156 (1948); *and Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921).

If this Honorable Court is not satisfied that it has jurisdiction on appeal, it is respectfully submitted that this case is nonetheless properly before the Court since the questions presented herein are of substantial Federal import and the papers upon which the appeal is predicated can be considered as a petition for *certiorari,* pursuant to 28 U.S.C. §2301. *Commonwealth of Pennsylvania* v. *City of Philadelphia,* 353 U.S. 230 (1957). It should be noted that the Municipalities have conceded that this case is proper for review pursuant to a petition for *certiorari.* Motion to Dismiss or Affirm, p. 2. Therefore, if the Court concludes that it cannot hear this case as an appeal pursuant to 28 U.S.C. §1257(2), it is prayed that the Court should treat the jurisdictional statement as a petition for *certiorari* and grant such petition because of the importance of the issue involved.

III.

Summary of Argument

The decision of the California Supreme Court, upholding the imposition of personal property tax upon containers used in foreign commerce, gravely and profoundly changes long-standing rules, uniformly adopted on an international level, to exempt such instrumentalities of commerce from multiple local tax burdens. More than 120 years ago, this Court, in recognition of such international practice, adopted the "Home Port" doctrine pursuant to which a vessel engaged in foreign commerce would be subject to tax only in the jurisdiction in which its owner is resident or domiciled. *Hays* v. *Pacific Mail Shipping Co.,* 58 U.S. (17 How.) 596 (1855). The "Home Port" doctrine must be sustained in the instant case because: (i) the apportionment concept, which this Court approved in the case of interstate commerce, is not feasible in foreign commerce; (ii) the foreign trading partners of the United States have relied upon the existence of the "Home Port" doctrine and their interests should not lightly be discarded; and (iii) the doctrine recognizes the importance of uniformity in the international carriage of goods and persons (which is so important to and interconnected with the foreign relations and commerce of the Nation), and has most appropriately reserved the exclusive authority of regulation of the Federal Government in this area.

The application of any law in the United States which affects relations with foreign countries, including those arising under treaty obligations of the United States, cannot ignore the reliance interests of foreign countries. None of our treaty or trading partners has imposed any tax on foreign-owned containers. Other nations uniformly exempt

foreign vessels, ships' gear and other integral parts of the vessel from taxation in their respective jurisdictions on the basis that other nations follow the same or similar practices. This concept is embedded in the "Home Port" doctrine. The Court has recognized the importance of this consideration in *Zenith Radio Corporation* v. *United States*, 98 S.Ct. 244 (1978).

The decision of the California Supreme Court ignores the elements of Federal concern and, if allowed to stand, would produce profound and fundamental changes, in fact, upheavals, upon the foreign relations and commerce of the United States. Because of the elemental nature of the changes that would be effected if the "Home Port" doctrine were not sustained in the case of foreign instruments used exclusively in foreign commerce, the validity of the tax in the instant case must be considered within the context of a number of provisions of the Constitution, including: (i) the Commerce Clause; (ii) the Treaty Power and Supremacy Clauses; (iii) the Prohibition Against Tonnage Duties Clause; (iv) the Import-Export Clause; and (v) the Due Process Clause. The Taxpayers respectfully submit that imposition of personal property tax by the Municipalities is in violation of each of the above-mentioned provisions of the Constitution.

The fundamental objection to imposition of tax by the Municipalities in the instant case arises from the necessity for regulation of foreign commerce by the Federal Government in order to maintain a system of uniformity between nations. Whether under the Commerce, Treaty Power, Supremacy, Tonnage Duties, Import-Export or Due Process Clauses, the Federal Government must be regarded as bearing the final and absolute authority to regulate foreign commerce. These Constitutional provisions ensure

that the Nation will speak with one voice when dealing with foreign nations, and thereby avoid the frictions that would otherwise develop between nations, as well as the states. *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976); *and Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941). The existence of this Federal interest and necessity for Federal regulation is directly relevant to the validity of the tax imposed by the Municipalities under each of the aforementioned provisions of the Constitution.

The necessity for Federal regulation in this area arises out of, and is demonstrated by, the following factors:

1. The entire framework and fabric of the international treatment of instrumentalities of commerce has been the reciprocal exemption of such items from the incidence of local taxation or customs duties. *See, e.g.*, 46 U.S.C. §§121, 141 and 142. Over the years, many of these international rules or conventions have been memorialized in treaties, such as the Container Convention, the various international aviation conventions, the FCN treaties, including the FCN treaty with Japan, and the GATT. Specifically, the Container Convention grants containers temporary admission free of all import duties and import taxes, which are defined to mean "not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation." Container Convention, Ch. I, Art. 1(b). The entry into these treaties by the Federal Government evidences an intention to deal with vessels and other instrumentalities of foreign commerce, as a matter of foreign relations, solely upon the basis of reciprocal exemption from local taxation. As stated in *Jordan* v. *Tashiro*, 278 U.S. 123, 127 (1928), treaties should "be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. . ."

2. In addition to the above-mentioned treaties, the rules of reciprocity are engrained in the laws of the United States. These laws reflect not only the policy of reciprocal exemption for foreign carriers but also a clear Federal intent for uniform regulation in this area. One example of such laws is the Federal excise tax which, since 1790, has been imposed upon the tonnage of vessels entering the territorial waters of the United States, subject to the existence of reciprocal exemptions as provided by treaty or Executive action. 46 U.S.C. §§121, 141 and 142. Thus, even in the absence of treaties, the President is authorized to suspend the application of the excise tax upon vessels of foreign nations upon a reciprocal basis or to impose discriminatory duties against the vessels of foreign nations determined to have imposed discriminatory duties against United States-owned vessels. The net effect of these provisions is to assure parity of treatment of vessels on a reciprocal basis by all nations. A second, and more pertinent, example consists of the customs regulations, which the Federal Government adopted to implement the provisions of the Container Convention to exempt foreign-owned or operated containers, used exclusively in foreign commerce, from "all duties and taxes whatsoever chargeable by reason of importation." Under these regulations, containers are designated as "instruments of international traffic" and upon their arrival at ports within the United States are to be released without: (i) formally being considered as having entered the United States; and (ii) the payment of duty. *See*, 19 C.F.R. §10.41a(a)(1). It is submitted that, if the Federal Government, pursuant to the provisions of an international treaty obligation, as implemented by Federal law and regulations, has taken the position that the containers have not entered the territory of the United States for purposes of the imposition of duty

or other taxes chargeable by reason of importation, the States or local governments cannot, particularly through reliance upon a highly tenuous "average presence" fiction, subject these containers to local property taxation.

3. The action of the Municipalities, as sanctioned by the California Supreme Court, bears upon the Nation as a whole and, unless reversed by the Court, would have the immediate effect of subverting long-established and carefully determined actions taken by the Federal Government to regulate this important and highly sensitive area of foreign relations and commerce. *Zschernig* v. *Miller*, 389 U.S. 429 (1968); *and Belmont* v. *United States*, 301 U.S. 324 (1937). Unless the decision of the California Supreme Court is reversed, the incidence of local property tax upon foreign-owned or operated instrumentalities used exclusively in foreign commerce will proliferate and lead to a pervasive system of foreign retaliation, directed solely against United States flag carriers. This conclusion is supported by a review of the events which have transpired since the final entry of the decision of the California Supreme Court on December 28, 1977, including: (i) the determination by the State of Oregon in January 1978 to adopt the position enunciated by the California Supreme Court; (ii) the proposal by the California State Board of Equalization to subject foreign-owned aircraft to California property tax; and (iii) the abandonment by the California legislature of a bill to exempt containers from property tax in California.

4. These events have prompted the issuance of expressions of concern to the State Department on behalf of at least eight foreign governments, including Denmark, Finland, France, Japan, the Netherlands, Norway, the United Kingdom and the Federal Republic of Germany. The pro-

posal by the California State Board of Equalization to subject aircraft used exclusively in foreign commerce to property taxation has prompted at least eleven foreign governments, including Canada, Denmark, France, Japan, Mexico, the Netherlands, New Zealand, Norway, Sweden, the Federal Republic of Germany and the United Kingdom to issue formal expressions of concern to the State Department. Moreover, on June 12, 1978, the EEC decided to study suitable counter-measures to take against non-member states the practices of which are detrimental to the maritime interests of member states.

5. The action of the Municipalities, as sanctioned by the California Supreme Court, invites retaliation as against all United States-owned instrumentalities of commerce. The State Department in a letter to Governor Jerry Brown of the State of California expressed its concern that the continued imposition of property taxes by local governments of the State of California upon foreign-owned containers used exclusively in foreign commerce would result in the likelihood of retaliatory taxes being imposed upon United States shipping companies. Several foreign nations have directly referred to the possibility of retaliation against United States-owned instrumentalities, such as aircraft, if the principle sustained by the California Supreme Court is extended thereto. More importantly, the laws of the Federal Republic of Germany grant exemption from taxation only upon the basis of reciprocity. The imposition of tax in the Federal Republic of Germany upon United States-owned containers will follow automatically without further legislative action by that Government.

Clearly and properly so, there are numerous areas, including many in the area of foreign commerce, where actions by State or local governments are proper and can be

co-existent with Federal regulation. *Cf. Ray* v. *Atlantic Richfield Co.,* 98 S.Ct. 988 (1978); *and Bob-Lo Excursion Co.* v. *Michigan,* 333 U.S. 28, 35 (1948). In the case of taxation, the Court has noted upon a number of occasions that goods or equipment in interstate commerce must pay their just share of State and local government costs incident to interstate commerce. However, the states may not transfer general tax burdens upon interstate, and more particularly foreign, commerce. *See, Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977); *and Ingels* v. *Morf,* 300 U.S. 290 (1936). *See also, McGoldrick* v. *Gulf Oil Corp.,* 309 U.S. 414 (1939). It is submitted that, by whatever standard may be applied, the containers in question must be regarded as having "paid their own way."

It is customary that, through the imposition of specific wharfage and dockage charges upon the user of port facilities, such as the Taxpayers, the Municipalities recover, at the very least, the cost of all services and facilities provided to the user of containers. Such charges are used to pay all expenditures incurred by the port facility, including police and security protection, road service within the harbor and in many cases fire protection. For instance, the Port of Long Beach maintains its own security force and operates its own fire fighting equipment. The published financial statements of at least Los Angeles County during the years in issue reflects that revenues have exceeded total expenditures incurred for the provision of harbor services.

In addition to the foregoing charges, either directly or indirectly, four of the Taxpayers were required to pay a "possessory interest" tax to the Municipalities based upon the value of their respective leasehold interests in the port facilities.

The published financial reports of the Municipalities further reflect that during the years in issue less than two to three percent of the total revenues of the Municipalities could be considered as providing any potential measure of support, benefit or protection to the Taxpayers through police protection, fire protection or road construction or maintenance. Under the circumstances, there can be no question that the Taxpayers' containers have and do "pay their own way."

It is respectfully submitted that, for the foregoing reasons, the tax, as applied to the Taxpayers' containers is repugnant to the Constitution and the treaty obligations of the United States.

IV.

Argument

A. Foreign Vessels, Aircraft and Integral Parts Thereof Engaged in Foreign Commerce Are Subject to Tax Only in Their Home Port

The Court more than 120 years ago formulated the "Home Port" doctrine as the most appropriate means of eliminating problems of multiple taxation and interference by State or local governments with the uniform regulation of foreign relations and commerce by the Federal Government in the highly sensitive area of international carriage of goods or persons through vessels or other instrumentalities of commerce. *Hays* v. *Pacific Mail Shipping Co.,* 58 U.S. (17 How.) 596 (1855). Under this rule a vessel or other instrumentality of commerce is subject to taxation in its "Home Port." The Court, in the adoption of this doctrine, formally recognized the internationally accepted rule intended to eliminate problems of multiple taxation

upon vessels engaged in commerce in more than one jurisdiction.

The "Home Port" doctrine continues as the most appropriate means of resolving the foreign relations and multiple tax problems inherent in the operation of foreign instrumentalities, used exclusively in foreign commerce, for the following reasons: (i) apportionment is not feasible within the context of foreign commerce; (ii) the approach of the California Supreme Court would constitute a rejection of a long-standing rule relied upon by foreign nations in their commerce with the United States; (iii) it would constitute an unwarranted interference with the responsibility of the Federal Government to regulate foreign relations and policy in the highly sensitive area of international carriage of goods and passengers, where the Federal Government has carefully, through a number of means, taken steps to implement a program of reciprocal exemption from taxation for foreign instrumentalities.

Initially, the "Home Port" doctrine was applied only to ocean-going vessels. It was later extended to vessels engaged in river traffic. *St. Louis* v. *The Ferry Co.,* 78 U.S. (11 Wall.) 423 (1871). In *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U.S. 169 (1949), the Court concluded that, for instrumentalities used solely in interstate commerce, the "Home Port" rule must give way to an apportioned property tax. However, the Court was careful not to abrogate the validity of the "Home Port" rule in the case of instrumentalities used exclusively in foreign commerce. 336 U.S. at 173-174. Even in *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U.S. 18, 23 (1890), the Court was careful to note that it was not applying the apportionment rule to foreign commerce.

The Court in *Ott* noted that, in connection with interstate commerce, the utilization of apportionment largely eliminates the risk of multiple taxation and, hence, any Commerce Clause objection. However, the principle of apportionment cannot be implemented in the case of foreign commerce since there exists no final arbiter comparable to this Court nor any jurisdictional mechanism to require the various treaty and trading partners of the United States to reject their own established patterns for taxing instrumentalities of foreign commerce. *Cf. Standard Oil Company* v. *Peck,* 342 U.S. 382 (1952). In the area of foreign commerce, the "Home Port" doctrine eliminates this flaw inherent in apportionment and is the only viable solution. As noted by the Superior Court in this case:

> "To consider proration of taxes with foreign entities is not practical. There is no tribunal that can adjudicate these rights unless it be the International Court and to invoke its services jurisdiction must be consented to by all parties. For this reason, our Federal Courts have consistently held that vessels which are instrumentalities of foreign commerce and engaged in foreign commerce can be taxed in their home port only." App. at p. 24.

The application of the "Home Port" doctrine to foreign instrumentalities of commerce must be regarded as a factor affecting the relations of the United States with foreign countries. The continued efficacy of this rule is based to a significant extent upon the "reliance interests" of the foreign countries and the effect of such laws upon foreign persons. The "Home Port" doctrine has been in existence for a period in excess of a century. It has been accepted by a multitude of foreign nations, which likewise exempt foreign vessels, ships' gear and other integral parts of the

vessel, from taxation in their respective jurisdictions on the basis that other nations follow the same or similar concepts. The Court has recognized the importance of this consideration in *Zenith Radio Corporation* v. *United States,* 98 S.Ct. 2441 (1978), where it stated:

> ". . . foreign tax systems as well as private expectations thus have been built on the assumption that countervailing duties would not be imposed on nonexcessive remissions of indirect taxes. In light of these substantial reliance interests, the long-standing administrative construction of the statute should not be disturbed except for cogent reasons." 98 S.Ct. at 2449.

It is clear that the regulation of international carriage of goods and passengers by vessel, aircraft or other instrumentalities of commerce, particularly as regards the ingress and egress of foreign vessels, aircraft and other instrumentalities, is an area where the interests of the Federal Government far exceed those of State and local governments. *Ray* v. *Atlantic Richfield Company,* 98 S.Ct. 988 (1978); *and British Airways Board* v. *Port Authority of New York,* 558 F.2d 75 (2d Cir. 1977). Vessels and ship's gear have always been subject to special treatment in that they are treated as a mass of property belonging to the nation in which they are registered even though temporarily located in a foreign port or the high seas. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963); *and United States* v. *Flores,* 289 U.S. 137 (1933).

As will be discussed more completely in the next portion of the brief dealing with the Treaty Power and the Supremacy Clause, the Federal Government has entered into a number of bilateral and multi-lateral conventions intended to provide reciprocal exemption from customs duties and any other taxes imposed upon such instrumentalities. The

Federal Government has also adopted a comprehensive program of implementing laws designed to effectuate this program of reciprocal exemption of foreign vessels, aircraft and other instrumentalities of commerce from local duties or taxes. *See,* 46 U.S.C. §141 *et seq.;* and 19 C.F.R. §10.41a(a)(1).

The necessity for uniform regulation in this area and the continued adherence to the long-standing and universally accepted norms and standards of international conduct concerning such activities, as well as the importance of this question as a matter of foreign relations is eloquently attested to by: (i) the formal letters sent by, or on behalf of, twelve foreign governments to the State Department expressing their concern with respect to the imposition of tax by California upon foreign instrumentalities, used exclusively in foreign commerce; (ii) the letter from the State Department to Governor Brown expressing its concern that the continued application of California property tax to such instrumentalities was likely to result in retaliatory taxes being imposed upon United States carriers; (iii) the Brief of the Solicitor General; and (iv) the June 12, 1978 EEC resolution.

The preservation of the "Home Port" doctrine in the case of the international carriage of goods and passengers is necessary in view of the greater importance of uniformity in foreign commerce than in purely interstate commerce. The necessity for uniformity in this area was aptly expressed by Mr. Justice Johnson in his concurring opinion in *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 222-39. Uniformity cannot be achieved in this instance if local taxation of foreign instrumentalities used exclusively in foreign commerce is permitted to proliferate. In essence, this would permit any State, county, municipality or township to take actions, bearing no relationship to local bene-

fits or services conferred, that are likely: (i) to be construed as action by the United States; and (ii) to subject the Nation as a whole to serious international repercussions or even sanctions. The following question raised by Mr. Justice Miller in *Chy Lung* v. *Freeman,* 92 U.S. 275, 279 (1875) is highly relevant to the instant case:

> "If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?"

The issue in this case, moreover, is reminiscent of Justice Ellenborough's rhetorical question in *Buchanan* v. *Rucker,* 9 East 192 (K.B. 1803):

> "Can the island of Tobago pass a law to bind the rights of the whole world?"

The exclusive power to regulate foreign affairs enables the Federal Government to deal efficaciously with foreign nations through affirmative acts in order "to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interest." *Perez* v. *Brownell,* 356 U.S. 44, 57 (1958). Moreover, foreign commerce demands uniformity of regulation possible only through exclusive regulation by the Federal Government. *Brown* v. *Maryland,* 25 U.S. (12 Wheat.) 419, 445-449 (1827). *See also, Philadelphia & Southern Mail Steamship Co.* v. *Pennsylvania,* 122 U.S. 326 (1887); *Philadelphia & Reading Railroad Co.* v. *Pennsylvania,* 82 U.S. (15 Wall.) 232 (1873); *Bowman* v. *Chicago & N. Ry. Co.,* 125 U.S. 465 (1888); *and Chy Lung* v. *Freeman,* 92 U.S. 275, 279 (1875).

For these reasons, the "Home Port" doctrine must be sustained.

B. Imposition of the Tax Is Repugnant to Treaty Obligations of the United States and the Supremacy Clause

The Commerce Clause vests in the Congress the plenary power to regulate commerce among the several States, with foreign nations and with the Indian tribes. Once Congress has legislated on the regulation of commerce in these regards, the States, by reason of the Supremacy Clause, are preempted from legislating on the same subject matter in an inconsistent manner. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824). Similarly, the states are also preempted by the Supremacy Clause from legislating in a manner inconsistent with the letter and spirit of a foreign treaty, entered into by the Executive branch of the Federal Government pursuant to the Treaty power and ratified by a two-thirds vote of the Senate. *Missouri* v. *Holland,* 252 U.S. 416 (1920). Moreover, preemption by the Federal Government is further evidenced by the comprehensive programs of legislative, treaty and Executive action which the Federal Government has taken to assure, on an international basis, the reciprocal exemption of instrumentalities of foreign commerce from local taxation. This program is comprised, in pertinent part, of: (i) the Federal excise tax imposed upon the tonnage of both domestic and foreign vessels entering United States ports, based upon the principle of reciprocal exemption (*See,* 46 U.S.C. §121 *et. seq.*); (ii) the Container Convention and the implementing Customs Regulations contained in 19 C.F.R. §10.41; (iii) the Tariff Act of 1930, §322(a), which exempts instrumentalities of international traffic from duty and entry; (iv) the various aviation treaties and agreements; (v) the FCN treaties; and (vi) the GATT.

The foregoing network of treaties, laws and regulations constitutes a pervasive system of Federal rules carefully

designed to provide for the reciprocal exemption of foreign instrumentalities of commerce from the incidence of customs duties and taxes.

A review of these laws and treaty obligations, as well as their underlying purpose, is sufficient to demonstrate that the area has, because of the significant and sensitive foreign relations ramifications, been preempted by the Federal Government. Moreover, instrumentalities of foreign commerce, such as the containers involved herein, are subject to a series of specific charges, imposed by the relevant local governments, which more than cover the cost of the services provided. Under the circumstances, the interest which the Federal Government has in this area clearly preempts the right of State or local governments to impose taxes on foreign-owned instrumentalities of commerce.

The United States became a party to the Container Convention on March 3, 1969. The Preamble to the Container Convention states that the purpose of the contracting parties is "to develop and facilitate the use of containers in international traffic." This purpose is sought to be achieved through adherence to freedom from taxation as embodied in Chapter II, Article 2 of the Convention as follows:

> "Each of the Contracting Parties shall grant temporary admission free of import duties and import taxes and free of import prohibitions and restrictions, subject to re-exportation and to the other conditions laid down in articles 3 to 6 below, to containers when they are imported loaded, or imported empty to be re-exported loaded. Each Contracting Party shall retain the right to withhold these facilities in the case of containers which are imported on purchase or otherwise taken

into effective possession and control by a person resident or established in its territory; the same applies to containers imported from a country which does not apply the provisions of this Convention."

The terms "import duties" and "import taxes" are defined in Chapter I, Article 1(a) of the Container Convention as follows:

"For the purposes of this Convention:

(a) The term 'import duties and import taxes' shall mean not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation."

The phrase "all duties and taxes whatsoever chargeable by reason of importation" used in the definition of the term "import duties and import taxes" must be given the most liberal scope possible and includes all taxes imposed while containers are in transit. As stated in *Neilson* v. *Johnson*, 279 U.S. 47, 52 (1929):

"[t]reaties are to be liberally construed so as to effect the intention of the parties . . . when a treaty admits of two constructions, one restricting, the other enlarging the rights which may be claimed under it, the more liberal interpretation is to be preferred."

See also, Shank v. *DuPont*, 28 U.S. (3 Peters) 2, 42 (1829); *and, Hauenstein* v. *Lynham*, 100 U.S. 628, 629 (1879). Moreover, treaties must be construed to effectuate and secure the intended benefits of reciprocity. *Jordan* v. *Tashiro*, 278 U.S. 123, 127 (1928).

The rules set forth in the Container Convention have been implemented by the Federal Government through the

issuance of the customs regulations contained in 19 C.F.R. §10.41a(a)1, which provide that containers shall be released by the Customs Service without entry or the payment of duty.

Under the Customs Regulations, it is clear that, provided the containers are used within the limitations set forth in the regulations, the containers are not considered as having entered the United States. Based upon the discussion set forth at pages 45 to 47 hereof, the California property tax levied on the Taxpayers' containers is a general revenue measure that can in no way be said to relate to the recovery of the cost incurred in connection with the passage through the Municipalities of the containers. Such action on the part of the State of California, acting through the Municipalities, is repugnant to the Commerce and Supremacy Clauses of the Constitution. *See, McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940), wherein the Court stated as follows:

"It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty. *See, People* v. *Compagnie Generale Transatlantique*, 107 U.S. 59, 63. The Congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition at ships' stores and shall not become subject to the state taxing power. *The customs regulation prescribing the exemption from state taxation, when applied to the facts of the present case,*

states only what is implicit in the Congressional regulation of commerce presently involved. The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce. Sinnot v. *Davenport,* 22 How. 227; *People* v. *Compagnie Generale Transatlantique, supra,* 63; cf. *Kelly* v. *Washington,* 302 U.S. 1, 9, 10."

309 U.S. at 429. [Emphasis added.]

See also, Epstein v. *Lordi,* 389 U.S. 29 (1967); *and Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964).

The Federal Government has concluded FCN Treaties with 17 foreign governments, which typically contain "non-discriminatory taxation" provisions. *See,* FCN Treaty with Japan, Article XI(1). The FCN Treaties also contain provisions against the imposition of a tax on income, capital or any other basis in excess of that reasonably allocable to the territory of an FCN Treaty partner. *See,* FCN Treaty with Japan, Article XI(4).

The Taxpayers are subject to full *ad valorem* property taxation in Japan. The imposition of even an apportioned tax upon Taxpayers results in an exaction in excess of one full *ad valorem* tax. Since United States-owned containers are exempt from property taxation in foreign countries, such containers cannot be the subject of more than one *ad valorem* tax apportioned between the states. The effect of this situation is a direct and distinct discrimination against foreign-owned containers, which, unfortunately, is likely to result in direct retaliatory discrimination of an even greater magnitude against United States-owned or operated containers. *See,* Exhibits R and S.

The tax as imposed also exceeds the amount of property reasonably allocable to the Municipalities since, under Federal, as well as state law, the containers are not present therein. Lastly, the FCN Treaty with Japan in Articles IX(2) and XXII(2) provides for extension of the benefits of the Container Convention to the residents of Japan by virtue of the "most-favored-nation" clause.[9] *Santovincenzo* v. *Egan,* 284 U.S. 30 (1931). At all times during the taxable years at issue herein, the United States and other nations were parties to the Container Convention. Thus, the Taxpayers are entitled to treatment in the United States no less favorable than that accorded third countries, which treatment includes the protection afforded under the Container Convention.

The United States, by way of executive agreement, on January 1, 1948, became a signatory to the GATT. At all times relevant to this proceeding Japan was party to the GATT. Article III, paragraphs 1 and 2 and Article V, paragraphs 1 and 2 further reflect the pervasive system of treaties, international agreements, laws and regulations adopted by the United States to deal with this question.

The Municipalities' imposition of property taxes upon the containers herein constitutes, whether directly or indirectly, a tax on the goods imported in those containers. *Cf. Thames & M.M. Ins. Co.* v. *United States,* 237 U.S. 19 (1915) (Federal stamp tax on insurance policies insuring exports against maritime risks held tax on exported goods);

[9] Taxes for the tax years 1970 and 1971 involve periods before the date Japan became a signatory to the Container Convention, May 14, 1971. However, the most-favored-nation provision of the FCN Treaty with Japan affords its nationals rights to the same treatment afforded nationals of any third country. Since the United States was a signatory to the Container Convention during all years in issue, Japan is entitled for all such periods to the benefits of the Container Convention under the FCN Treaty.

United States v. *Hvoslef*, 237 U.S. 1, 17 (1914) (Federal stamp tax on charter parties held tax on exported goods); *and Fairbank* v. *U.S.*, 181 U.S. 283 (1901) (Federal stamp tax on foreign bill of lading held equivalent of a direct tax on the goods themselves). Since the containers are also taxed in Japan, goods imported into the United States bear the burden of this tax also. The imposition of the Municipalities' tax herein may require imported goods to bear two taxes, while domestic goods may bear no tax, or at most, one tax, in violation of the GATT provisions. As such, the application of the Municipalities' property tax to the containers herein is repugnant to the Supremacy Clause and must fall.

The foreign trading and treaty partners of the United States have acted in reliance upon their interpretation and understanding of the Constitution, the laws of the United States and the above-mentioned treaties and Executive agreements, as evidenced by the fact that foreign-owned containers, including United States-owned containers, are not subject to taxation by such foreign trading and treaty partners.

The conduct of the parties to a treaty is highly relevant for purposes of interpreting the pertinent treaty provisions. *Factor* v. *Laubenheimer*, 290 U.S. 276, 294-295 (1933). *See, also, Choctaw Nations* v. *United States*, 318 U.S. 423 (1943). Moreover, as noted by this Court in *Zenith*, such reliance, particularly over a long period of time, must be taken into account.

The above treaties, as implemented and supplemented by the pervasive system of laws and regulations, particularly in the area of customs regulations, excise duties on the tonnage of vessels entering the United States and the various laws applicable to vessels and aircraft, constitute a direct prohibition on the imposition by Municipalities of

property tax on Taxpayers' containers. The treaties, as well as the various United States laws considered herein, constitute an express or implied declaration of the dominant Federal interest in the area so as to preclude enforcement of state laws touching upon the same matters. *See, Ray* v. *Atlantic Richfield Company*, 98 S.Ct. 988 (1978). *See also, Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148 (1941). Moreover, the treaties and United States laws and regulations further reflect an interest in uniformity in matters affecting foreign commerce. *See, Cooley* v. *Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299, 319 (1852).

The authority to regulate and tax foreign commerce should, in this unique and highly sensitive area, therefore, be left exclusively to the Federal Government.

C. Imposition of the Tax Is Repugnant to the Prohibition Against Tonnage Duties Clause

The Prohibition Against Tonnage Duties Clause is intended to prevent taxation of imports and exports through the subterfuge of the imposition of a State or local tax upon the vessels themselves. *Steamship Co.* v. *Portwardens*, 73 U.S. (6 Wall.) 31, 35 (1867); *and Packet Co.* v. *Keokuk*, 95 U.S. 80 (1876). Although the prohibition is against "tonnage duties," this term has been defined to include all types of taxes which do not bear a relationship to specific benefits conferred. *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 265-266 (1935). *See also, Steamship Co.* v. *Portwardens*, 73 U.S. (6 Wall.) 31 (1867). The containers in the instant case are instrumentalities of commerce in their own right and also constitute an integral part of the vessels which transport them. Therefore, on either ground, containers are embraced within the Constitutional prohibition against a "duty of tonnage," and,

consequently, the tax imposed by the Municipalities is repugnant thereto.

A general tax levy imposed upon the property of all citizens, including vessels without distinction, is prohibited under the Tonnage Duty Clause. In *Steamship Co.* v. *Portwardens,* the Court invalidated a tax which was imposed without regard to use of services. There can be no question that a tax imposed upon a vessel, for the general benefit of a community, as distinct from services rendered for the vessel, is prohibited. The services rendered for the containers in this case are the subject of various specific charges, as noted above, including wharfage charges and docking charges. Various other charges and taxes are imposed upon the owners of trucks upon which the containers are transported. These charges or taxes are in the nature of compensating levies that bear some relationship to services rendered by the Municipalities. However, the tax levied by the Municipalities herein is used to finance the other operations of the Municipalities, principally public welfare related costs, which cannot be said in any proper manner to provide any service or benefit for the Taxpayers' containers.

The containers fall within the scope of the protection afforded by the Constitution to vessels and constitute a significant technological advance in the ocean transport of cargo. The manner in which the containers and the vessels that carry them have been designed and constructed makes it clear that the containers are an integral part of the vessels. In effect, a container is a portion of the vessel that allows it to assume amphibious characteristics. To exclude containers from the protection against tonnage duties would clearly discriminate against containers, as compared to more traditional instrumentalities of foreign commerce, in a manner contrary to the admonition of Mr. Justice Frankfurter in *Northwest Airlines Inc.* v. *Minnesota,* 322 U.S. 292, 300 (1943), wherein he cautioned against the fixing of rules which did not permit continuing technological developments to be taken into account. Moreover, containers are specifically recognized as instrumentalities of commerce in their own right under United States law. 19 C.F.R. §10.41.

The exclusion of containers from the umbrella of protection granted to vessels would constitute an unwarranted distinction between vessels and an integral part thereof. Ocean-going containers are an integral part of the vessel upon which they are transported. *See, Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 53 (2d Cir. 1976); and *Leathers Best, Inc.* v. *S.S. Mormaclynx,* 451 F.2d 800, 815 (2d Cir. 1971). The principal advantage that has accrued from the development of containerized carriage of cargo in ocean shipping is the reduction of cost of imports and exports. This benefit should not be undermined by the imposition of local taxes which: (i) are totally disproportionate to the benefits or services provided by the taxing jurisdiction; and (ii) are levied upon an integral part of a vessel.

D. Imposition of the Tax Is Repugnant to the Import-Export Clause

Under the Import-Export Clause, the States may not impose a tax related to goods moving in import or export commerce, except to the extent that the tax is intended to allow the states to recover their expenditures in respect of inspection or other specifically related functions. Products moving in the mainstream of import or export transit are entitled to the protection of the Import-Export Clause, regardless of the name by which the tax is designated or its object. Moreover, the Import-Export Clause precludes application of tax upon the instrumentality in which the

imports and exports move in the mainstream of commerce if the tax either: (i) affects any of the policies underlying adoption of the Import-Export Clause; or (ii) constitutes a transit fee. The personal property tax imposed upon ocean-going containers in the instant case, carrying goods in the import-export trade, falls specifically within the prohibition of Article I, Section 10 of the Constitution and is repugnant thereto.

1. *The Import-Export Clause Precludes Taxation of Instrumentalities In Which Imports and Exports Are Transported*

In *Michelin Tire Corporation* v. *Wages,* 423 U.S. 276 (1976) and *Department of Revenue* v. *Association of Washington Stevedoring Companies,* 98 S.Ct. 1388 (1978), the Court concluded that the Import-Export Clause does not embody an absolute test and that the validity of State or local regulations must be considered within the context of the purposes sought to be achieved through its incorporation in the Constitution as well as the practical effect of the tax imposed upon imports and exports. These purposes are as follows:

> "The Framers of the Constitution thus sought to alleviate three main concerns. . .: The Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically."
>
> *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276, 285-86 [Footnotes omitted].

The Court stated that any tax having an impact upon imports or exports, which contravenes the policies sought to be achieved, is an impermissible "impost or duty."

The tax in the instant case: (i) clearly infringes upon and restrains the power of the Federal Government to conduct foreign policy; (ii) disrupts harmony between the states; and (iii) interferes with the free flow of goods through the States. Unlike the circumstances in *Michelin* and *Washington Stevedoring,* the local tax imposed in the instant case produces an immediate and serious impact upon the foreign relations, policy and commerce of the United States. *Michelin* did not involve a question of local taxation interfering with the right of the Federal Government to regulate foreign policy. The taxpayer therein was a New York corporation and the imported goods had come to rest in the taxing jurisdiction. Moreover, the tax in *Washington Stevedoring* did not usurp the exclusive power of the Federal Government to regulate foreign relations since the object of the tax was a local business, conducted entirely within the State of Washington.

As contrasted with *Michelin* and *Washington Stevedoring,* the activity involved herein is the foreign transport of cargo and the object of the tax, foreign-owned ocean-going containers, are an integral part of a foreign vessel and part of the ship's gear. *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 53 (2d Cir. 1976); *and Leathers Best, Inc.* v. *S.S. Mormaclynx,* 451 F.2d 800, 815 (2d Cir. 1971). Trade conducted through vessels constitutes an important aspect of the foreign relations of the United States with

other nations, a point which the Framers of the Constitution explicitly recognized.

The impact on the foreign relations of the United States of the imposition of this tax on the Taxpayers' containers has been reviewed above in detail.

If the authority of the Federal Government in this area must be shared with local governmental units, the foreign governments would be required to deal with a multitude of inferior sovereigns. Within the context of the effect upon the international carriage of goods and passengers, clearly such a result is contrary to the Constitution and totally unworkable within the framework of the carefully established separation of powers between the Federal Government and the States. *See, Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 228-229 (1824). There can be no question that the tax imposed by the Municipalities contravenes the first policy consideration enunciated by the Court in that it usurps the powers reserved to the Federal Government with respect to the regulation of foreign policy.

2. *The Tax Imposed By the Municipalities Constitutes a Transit Fee*

The tax in the instant case also violates the third policy consideration enunciated in *Michelin* in that, if the tax were permitted to be imposed, it would impair the free flow of goods. The Court stated in *Michelin* that nondiscriminatory property taxes imposed upon property may be sustained to the extent necessary to compensate the state for benefits rendered. The Municipalities in this case interpret this language as a broad license to tax all goods and objects moving through a state to the same extent as property permanently resting therein. In fact, the tax imposed by the Municipalities attaches at the moment of entry of the containers into the jurisdiction, without any regard to, or

consideration of, the services rendered or made available by the Municipalities. As reviewed hereinafter, the tax imposed by the Municipalities is void of any relationship to services rendered to the containers.

The Court in *Michelin* expressed its concern as to the possible risk of multiple taxation that might arise in transit in the following statement:

> "Finally, nondiscriminatory *ad valorem* property taxes do not interfere with the free flow of imported goods among the States, as did the exactions of States under the Articles of Confederation directed solely at imported goods. *Indeed, importers of goods destined for inland states can easily avoid even those taxes in today's world. Modern transportation methods such as air freight and containerized packaging. . . , enable importation directly into the inland states.*
>
> * * *
>
> An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States. In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State. *A nondiscriminatory ad valorem property tax obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.*"
>
> 423 U.S. 276 at 288-90. [Emphasis added; footnotes omitted.]

The distinction between a proper exaction levied for purposes of recovering expenses incurred in connection with services extended to vessels and a mere transit fee was established in *Packet Co.* v. *Keokuk,* 95 U.S. 80, 84-5 (1877). The rationale enunciated in *Packet Co.* requires establishment of a reasonable relationship between the services rendered and a service which is rendered to the class of persons using such services. *See, Massachusetts* v. *United States,* 98 S.Ct. 1153 (1978); *and Washington Stevedoring,* 98 S.Ct. 1388 (1978). In *Massachusetts* v. *United States,* the Court reiterated its acceptance of the rationale set forth in *Packet Co.* However, Mr. Justice Rehnquist and Mr. Chief Justice Burger jointly dissented from the majority opinion on the grounds that the complainant had not been given an opportunity to establish the excessive nature of the tax involved therein.[10] In *Washington Stevedoring,* the Court again reiterated acceptance of the reasonable relationship test. However, Mr. Justice Powell dissented on the basis of the limitation imposed by the majority of the Court that the tax must be imposed upon the goods themselves, commenting that the limitation constituted resurrection of the direct-indirect dichotomy rejected in *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977).[11] The test enunciated by Mr. Justice Powell is

[10] If the Court determines that any of the evidence upon which any of the arguments made herein is not cognizable by the Court and further determines that any of this data is necessary in light of the recent decisions of this Court in *Complete Auto, Washington Stevedoring, Zenith* or *Massachusetts* v. *United States,* which were decided by this Court after the decision of the Superior Court herein, the Taxpayers request that this case be remanded to the Superior Court in order that the parties may formally introduce the pertinent evidence.

[11] The tax imposed upon the containers is an indirect tax falling upon the goods. *Cf. Thames & M.M. Ins. Co.* v. *U.S.,* 237 U.S. 19 (1915); *and Fairbank* v. *United States,* 181 U.S. 283 (1901). If the tax is not imposed upon the goods, and is considered to be imposed upon the vessel, then it is prohibited under the Tonnage Duties Clause.

based upon an economic analysis—does the tax bear a reasonable relationship to the benefits conferred?

The answer to that question in the instant case is that there is no relationship between the tax and the services rendered. The type of exaction which could be sustained under such a test is a wharfage or docking fee, specifically imposed to compensate the state for a service rendered. However, the tax in the instant case, as a general levy used to fund all public services rendered without distinction as to the recipient thereof, is not the type of tax that is permissible. The tax is used not to repay for special property usage, as in *Packet Co.* and *Massachusetts* v. *United States,* but, rather, for such items as school funding, mosquito abatement and any other general need without limitation. Moreover, the tax is measured by the value of the containers, a criterion which is wholly void of any relationship to the use of services. In practical terms, owners of older containers pay lesser tax even though the same services are used. Clearly a tax which has the scope of the exaction demanded by the Municipalities, as applied in the manner discussed herein, transcends the rationale of "making the imported goods pay their own way." Consequently, it is submitted that the decision of the California Supreme Court must be reversed.

Lastly, the Court in *Michelin* noted that modern means of transport, such as containerization, could be used to avoid multiple taxation as goods move through the country. The Court thereby recognized that containers could not be subject to local taxation since the economic effect thereof would be a burden on commerce. The California Supreme Court disregarded this admonition.

For the above reasons, the imposition of tax by the Municipalities is repugnant to the Import-Export Clause.

E. Imposition of the Tax Upon Ocean-Going Containers Violates Traditional Commerce Clause Considerations

The Court has held, on numerous occasions, that interstate commerce may be required to "pay its own way", without violating considerations underlying the Commerce Clause. In these cases, the tax must be: (i) applied to activity or property with substantial nexus to the state; (ii) fairly apportioned; (iii) related to services provided by the state; and (iv) applied in a nondiscriminatory manner. *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977). In the event this analysis were to be extended to foreign commerce, it is submitted that the tax imposed is repugnant to the Commerce Clause since, under the particular circumstances involved, it violates each of the abovementioned criteria.

a. *The Property of the Taxpayers Did Not Satisfy the Presence Test Imposed by Federal and State Law*

In *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization and Assessment,* 347 U.S. 590 (1943), the Court held that: (i) movable property used *in interstate commerce* may be considered to have a sufficient nexus with the state if such property repeatedly enters the jurisdiction; and (ii) a sufficient nexus exists if different items of movable property used *in interstate commerce* continually enter the jurisdiction. However, the *Braniff* case differs from the instant one since it dealt with property engaged exclusively in commerce in the United States. In this case, it is clear that, under Federal law, the Taxpayers' containers cannot be considered to have entered the United States. *See,* 19 C.F.R. §10.41a(a)(1). If the containers cannot be considered to have entered into commerce in the United States for purposes of Federal law, they cannot be considered present in California for pur-

poses of the imposition of California property tax. *Cf. McGoldrick* v. *Gulf Oil Corp.,* 309 U.S. 414, 429 (1939).

Moreover, the containers did not satisfy the actual presence test of Section 205 of the California Administrative Code, which requires that movable property, other than vessels, must have a *situs* within the taxing jurisdiction for a period equal to at least six months. Thus, if the containers are considered not to constitute vessels, the tax violates the basic regulation governing imposition of the tax.

Under the circumstances, since the containers did not enter the United States and were not in California for periods in excess of six months, the Taxpayers' containers cannot be regarded as having moved into that mass of property subject to California property taxation.

b. *The Tax Is Not Related to Services Rendered*

The Court in *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977), made reference to *Ingels* v. *Morf,* 300 U.S. 290 (1936), which describes the relationship that must be established between the tax and the services rendered as follows:

> "[t]o justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is *demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power* . . . This may appear from the statute itself, . . . or from the use of the money collected, to defray such expense."
>
> 300 U.S. at 294-95. [Emphasis added, citations omitted.]

The lack of relationship in this case is obvious from a mere examination of the structure of the tax. As was recently noted in *Commonwealth of Massachusetts* v. *United States,* 98 S.Ct. 1153, 1165 (1978), the charge must be "structured to compensate the government for the benefit conferred." For instance, in *Interstate Transit, Inc.* v. *Lindsey,* 283 U.S. 183 (1931), the Court invalidated a tax intended to compensate the state for road use based upon the carrier's seating capacity. In *Sprout* v. *South Bend,* 277 U.S. 163 (1928), the Court invalidated a tax to compensate the state for road use based upon the amount of gasoline in the carrier's gas tank.

The tax imposed by the Municipalities is wholly void of any relationship to services rendered by the Municipalities. The structure of the tax is such that the tax burden falls upon the value of property, regardless of the use of services. The newer the container, the greater its value and, therefore, the amount of tax due. Thus, the tax paid is a function not of the services rendered or necessitated but, rather, the age and value of the container. In effect, the more efficient the taxpayer, the newer its equipment, the greater will be the tax levy. By the same token, lesser tax will be due with respect to older and more dilapidated containers. Although this rule may have virtue in terms of spreading the tax burden upon those most able to pay, it has no precedent in traditional Commerce Clause jurisprudence as bearing a proper relationship to the services utilized, particularly in the case of foreign instrumentalities used exclusively in foreign commerce.

More significantly, it must be recognized that the containers in the instant case pay their own way without application of the personal property tax. The wharfage and dockage charges adequately compensate the Municipalities for use of harbors. The taxes imposed upon gasoline as well as registration taxes, compensate the Municipalities for use of highways and protection afforded while in transit through the state. The imposition of an additional levy, admittedly for purposes of funding schools, controlling mosquitos and generating welfare funds, transcends the limits of making the containers pay their own way. The personal property tax is, in reality, nothing more than an attempt to make the containers pay for the way of others.

c. *The Tax is Not Fairly Apportioned*

For the reasons discussed at page 24 hereof, due to the absence of an arbiter such as this Court, the tax imposed by the Municipalities cannot be fairly apportioned.

d. *The Tax is Applied in a Discriminatory Manner*

The application of an apportioned tax to foreign instrumentalities of commerce, while foreign countries exempt United States-owned containers, implicitly effectuates cost increases upon utilization of foreign-owned containers. The exemption of foreign-owned instrumentalities of commerce from local taxation in foreign countries is virtually universal in its application. Against this background, the tax imposed by the Municipalities suffers from the same infirmities recognized in *Moorman Manufacturing Co.* v. *Blair,* 98 S.Ct. 2340, 2356 (1978) (dissenting opinion):

> "Forty-four of the 45 States, other than Iowa, that impose a corporate income tax utilize a similar three-factor apportionment formula. Since Iowa's formula inevitably discriminates against out-of-state sellers, and since it has not been justified on any fiscal or administrative basis, I would hold it invalid under the Commerce Clause."

The uniformity of exemption established as a matter of international law would be severely disrupted if the action of the Municipalities is sustained by the Court.

For these reasons, the tax imposed by the Municipalities is repugnant to the Commerce Clause.

F. The Tax Is Repugnant to the Due Process Clause

Under the Due Process Clause, any local tax which is imposed must be based upon the situs of income producing activity or property and bear a reasonable relationship to the extent of the activity within the taxing jurisdiction. *See, General Motors* v. *District of Columbia,* 380 U.S. 553, 561 (1965); *and Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435 (1940).

In the context of property taxation, "due process" requires *situs* of the property within the taxing jurisdiction. *See, e.g., Braniff Airways, Inc.* v. *Nebraska State Board of Equalization and Assessment,* 347 U.S. 590, 598-599 (1947). The tax imposed is based upon an apportionment made pursuant to an "average presence" fiction that is authorized neither by Federal law, nor by the relevant California law. Under the laws of the United States governing the entry of imported articles of any type into the flow of commerce within the United States, the containers of the Taxpayers were not considered to have entered the United States. 19 C.F.R. §10.41(a)(1). Moreover, Section 205, Title 18, California Administrative Code provides that, before a specific item of movable property, other than vessels, will be considered to have a taxable *situs* in the taxing jurisdiction, it must be present therein for six of the twelve months preceding the lien date. None of the containers taxed had been in the State for as long as six months in the twelve months preceding the lien date. The statute is an implicit rejection by the California Legislature of the average presence test sanctioned in *Braniff.* Thus, if the containers herein are considered not to constitute vessels, the tax imposed by the Municipalities violates the basic regulation governing imposition of the tax.[12]

The Municipalities have attempted to justify the tax imposed on the basis of police and fire protection and road usage afforded to the property of the Taxpayers. This justification clearly falls outside of the limitations described in *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435 (1940). The published reports relating to the revenues and expenditures of the Municipalities indicate that less than two to three percent of the funds collected generally from property taxes are devoted to police and fire protection and road construction and maintenance. *See,* Appendix to Jurisdictional Statement, 36a-47a. Moreover, it is clear that, the Municipalities exact a sufficient and adequate *quid pro quo* for services rendered, through various specific levies charged for all services rendered.

The imposition of a tax that bears little or no relationship to the benefit provided is clearly repugnant to the Constitutional requirement of due process. Therefore, the decision of the California Supreme Court sustaining such a tax must be reversed.

[12] It is submitted that the containers are an integral part of the vessels themselves. As an integral part of the vessels themselves, the containers were exempt from taxation under the California Constitution as it existed during the taxable years in issue herein. Cal. Const., Art. 13, §4 (1932), repealed in 1974. At that time, the California Constitution provided that vessels registered in California could be subjected to personal property tax. This provision implicitly recognized the exemption of foreign registered vessels. The California Constitution as amended in 1974 extends the exemption to all vessels in the state (in excess of 50,000 tons) engaged in transportation of freight or passengers.

CONCLUSION

The decision of the California Supreme Court, sustaining the imposition of personal property tax upon containers used in foreign commerce and present within the territorial limits of the Municipalities for only temporary periods as part of an international voyage, is contrary to the Commerce, Supremacy, Treaty Power, Tonnage Duties, Import-Export and Due Process Clauses of the Constitution. The decision of the California Supreme Court constitutes a significant interference with the foreign relations of the United States and disturbs the existing harmony in the shipping industry based upon rules of reciprocity. For these reasons, the Taxpayers respectfully request that the decision of the California Supreme Court be reversed.

Respectfully submitted,

PETER L. BRIGER
BRIGER & ASSOCIATES
299 Park Avenue
New York, New York 10017
(212) 758-4000

SHELDON S. COHEN
COHEN & URETZ
1775 K Street, N.W.
Washington, D.C. 20006
(202) 293-4740

REED M. WILLIAMS
RONALD L. YOUNG
GRAHAM & JAMES
100 Oceangate, Suite 515
Long Beach, California 90802
(213) 435-4435

Counsel for Appellants

APPENDIX

APPENDIX

Statutory, Constitutional and Treaty Provisions Involved

A. *Cal. Rev. and Tax Code, Section 201*

"All property in this State, *not exempt under the laws of the United States* or of this State, is subject to taxation under this Code."

(Emphasis added.)
59 West's Annotated California Codes 215 (1970).

B. *18 Cal. Ad. Code, Section 205*

"(a) General. Movable Property is *all* property which is intended to be, and is, moved from time to time from one location to another . . .

Movable property has situs where located on the lien date if it has been in the county for more than six of the twelve months immediately preceding the lien date and if it is to remain in or be returned to the county for any substantial period during the twelve months immediately succeeding the lien date . . .

Property which does not have situs where located on the lien date pursuant to the previous paragraph has situs at the location where it is normally returned between uses or, *if there is no such location, at the principal place of business of the owner.*"

(Emphasis added.)

C. *Constitutional Provisions*

1. *Article I, Section 10, Clause 2:*

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws; . . ."

2. *Article I, Section 10, Clause 3:*

"No State shall, without the Consent of Congress, lay any Duty of Tonnage; . . ."

3. *Article I, Section 8, Clause 3:*

"The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

4. *Article II, Section 2, Clause 2:*

"[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . ."

5. *Article VI, Clause 2:*

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

6. *Amendment XIV, Section 1:*

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

D. *Treaty Provisions*

1. *The Customs Convention on Containers,* 20 U.S.T. 301, T.I.A.S. 6634:

"Chapter I, Article 1(a):

For purposes of this Convention:

(a) The term 'import duties and import taxes' shall mean not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation.

Chapter II, Article 2:

Each of the Contracting Parties shall grant temporary admission free of import duties and import taxes and free of import prohibitions and restrictions, subject to re-exportation and to the other conditions laid down in articles 3 to 6 below, to containers when they are imported loaded, or imported empty to be re-exported. Each Contracting Party shall retain the right to withhold these facilities in the case of containers which are imported on purchase or otherwise taken into effective possession and control by a person resident or established in its territory; the same applies to containers imported from a country which does not apply the provisions of this Convention."

2. *The Treaty of Friendship, Commerce and Navigation Between Japan and the United States,* 4 U.S.T. 2063, T.I.A.S. 2863:

"Article XI(1):

Nationals of either party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade . . . within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions or any other object, or to requirements with respect to the levy or collection thereof, more burdensome than those borne by nationals and companies of such other party.

Article XI(4):

In the case of companies of either Party engaged in trade or gainful pursuit within the territories of the other Party, and in the case of nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party but not resident therein, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. . . .

Article XXII(2):

The term 'most-favored-nation treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies,

products, vessels or other objects, as the case may be, of any third country."

3. *The General Agreement on Tariffs and Trade,* 61 Stat. [5], [6], T.I.A.S. 1700:

"Article III, Paragraphs (1) and (2):

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic products.

The products of the territory of any contracting party imported into the territory of any contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly, to like domestic products."

E. Provisions of United States Code

1. 46 U.S.C. § 121

§ 121. Amount of tonnage duties

Upon vessels which shall be entered in the United States from any foreign port or place there shall be paid duties as follows: On vessels built within the United States but belonging wholly or in part to subjects of foreign powers, at the rate of thirty cents per ton; on other vessels not of the United States, at the rate of fifty cents per ton, and any

vessel any officer of which shall not be a citizen of the United States shall pay a tax of fifty cents per ton.

A tonnage duty of 2 cents per ton, not to exceed in the aggregate 10 cents per ton in any one year, is imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or Newfoundland, and a duty of 6 cents per ton, not to exceed 30 cents per ton per annum, is imposed at each entry on all vessels which shall be entered in any port of the United States from any other foreign port, not, however, to include vessels in distress or not engaged in trade.

Upon every vessel not of the United States, which shall be entered in one district from another district, having on board goods, wares, or merchandise taken in one district to be delivered in another district, duties shall be paid at the rate of 50 cents per ton: *Provided,* That no such duty shall be required where a vessel owned by citizens of the United States, but not a vessel of the United States, after entering an American port, shall, before leaving the same, be registered as a vessel of the United States. On all foreign vessels which shall be entered in the United States from any foreign port or place, to and with which vessels of the United States are not ordinarily permitted to enter and trade, there shall be paid a duty at the rate of $2 per ton; and none of the duties on tonnage above mentioned shall be levied on the vessels of any foreign nation if the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nations, so far as they operate to the disadvantage of the United States, have been abolished. Any rights or priv-

ileges acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels shall not be impaired; and any vessel any officer of which shall not be a citizen of the United States shall pay a tax of 50 cents per ton.

2. 46 U.S C. § 128

§ 128. Light money

A duty of 50 cents per ton, to be denominated "light money," shall be levied and collected on all vessels not of the United States, which may enter the ports of the United States. Such light money shall be levied and collected in the same manner and under the same regulations as the tonnage duties: *Provided,* That no such duty shall be required where a vessel owned by citizens of the United States, but not a vessel of the United States, after entering an American port, shall, before leaving the same, be registered as a vessel of the United States.

3. 46 U.S.C. § 135

§ 135. Rights under treaties preserved

Nothing contained in this chapter shall be deemed in anywise to impair any rights and privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty on tonnage of vessels, or any other duty on vessels.

4. 46 U.S.C. § 141

§ 141. Suspension by President

Upon satisfactory proof being given to the President, by the government of any foreign nation, that no discriminat-

ing duties of tonnage or imposts are imposed or levied in the ports of such nation upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported in the same from the United States or from any foreign country, the President may issue his proclamation, declaring that the foreign discriminating duties of tonnage and impost within the United States are suspended or discontinued, so far as respects the vessels of such foreign nation, and the produce, manufactures, or merchandise imported into the United States from such foreign nation, or from any other foreign country; the suspension to take effect from the time of such notification being given to the President, and to continue so long as the reciprocal exemption of vessels, belonging to citizens of the United States, and their cargoes, shall be continued, and no longer: *Provided,* That the President is authorized to suspend in part the operation of sections 121 and 146 of this title so that foreign vessels from a country imposing partial discriminating tonnage duties upon American vessels, or partial discriminating import duties upon American merchandise, may enjoy in our ports the identical privileges which the same class of American vessels and merchandise may enjoy in said foreign country.

5. 46 U.S.C. § 142

§ 142. Retaliatory suspension of commercial privileges to foreign vessels

Whenever any foreign country whose vessels have been placed on the same footing in the ports of the United States as American vessels (the coastwise trade excepted) shall deny to any vessels of the United States any of the commercial privileges accorded to national vessels in the harbors, ports, or waters of such foreign country, the President, on receiving satisfactory information of the continuance of such discriminations against any vessels of the United States, is authorized to issue his proclamation excluding, on and after such time as he may indicate, from the exercise of such commercial privileges in the ports of the United States as are denied to American vessels in the ports of such foreign country, all vessels of such foreign country of a similar character to the vessels of the United States thus discriminated against, and suspending such concessions previously granted to the vessels of such country; and on and after the date named in such proclamation for it to take effect, if the master, officer, or agent of any vessel of such foreign country excluded by said proclamation from the exercise of any commercial privileges shall do any act prohibited by said proclamation in the ports, harbors, or waters of the United States for or on account of such vessel, such vessel, and its rigging, tackle, furniture, and boats, and all the goods on board, shall be liable to seizure and to forfeiture to the United States; and any person opposing any officer of the United States in the enforcement of this section, or aiding and abetting any other person in such opposition, shall forfeit $800, and shall be guilty of a misdemeanor, and, upon conviction, shall be liable to imprisonment for a term not exceeding two years.

6. 46 U.S.C. § 146

§ 146. Discriminating duty on merchandise imported in foreign vessels

A discriminating duty of 10 per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, and merchandise which

Appendix

shall be imported on vessels not of the United States; but this discriminating duty shall not apply to goods, wares, and merchandise which shall be imported in vessels not of the United States, entitled by treaty or any act of Congress, to be entered in the ports of the United States on payment of the same duties as shall then be paid on goods, wares, and merchandise imported in vessels of the United States, nor to goods wares, and merchandise imported in a vessel owned by citizens of the United States, but not a vessel of the United States, if such vessel, after entering an American port, shall before leaving the same be registered as a vessel of the United States.

F. Provisions of the Code of Federal Regulations
19 C.F.R. § 1041a

§10.41a Lift vans, cargo vans, shipping tanks, skids, pallets, and similar instruments of international traffic; repair components.

(a)(1) Lift vans, cargo vans, shipping tanks, skids, pallets, caul boards, and cores for textile fabrics, arriving (whether loaded or empty) in use or to be used in the shipment of merchandise in international traffic are hereby designated as "instruments of international traffic" within the meaning of section 322(a), Tariff Act of 1930, as amended. The Commissioner of Customs is authorized to designate as instruments of international traffic, in decisions to be published in the weekly Customs Bulletin, such additional articles or classes of articles as he shall find should be so designated. Such instruments may be released without entry or the payment of duty, subject to the provisions of this section.

Exhibit A

(Notice of Assessment of Los Angeles County)

76U480A-12-70

ASSESSMENT NUMBER	BILL NUMBER
P8027 3025220C00	45203625

MAIL EARLY—AVOID PENALTY

YAMASHITA SHINNIHON STEAMSHIP
210 W 7 ST
LOS ANGELES CALIF 90014
0014

Make Check Payable to:
L.A. COUNTY TAX COLLECTOR

TOTAL TAX	25111 49
6% Penalty After Aug. 31, 1971	
Collection Costs	
Additional Penalties	
Total After Penalties	

THIS BILL IS NOW DUE AND PAYABLE

Enter your Social Security, IRS, or Federal Employer's Number in box below

00452036250025111490026618172449 0000

26618 17 1506 68

COUNTY OF LOS ANGELES HAROLD J. OSTLY TAX COLLECTOR
225 N. Hill Street, Los Angeles, California 90012
Phone: 625-3611, Ext. 64575

UNSECURED PROPERTY TAX BILL
for Fiscal Year July 1, 1971 to June 30, 1972
(See #12 on reverse side)

YAMASHITA SHINNIHON STEAMSHIP
CO LTD
210 W 7 ST
LOS ANGELES CALIF 90014

CODE: 0014

7440 009 900

SITUS OR LOCATION:
1466 WILMINGTON SAN PEDRO RD
SAN PEDRO CALIF

PROPERTY DESCRIPTION

ASSESSMENT NUMBER	INDEX NUMBER	BILL NUMBER
P8027 3025220000	95003313	45203625

VALUES

ASSESSED VALUES DETERMINED BY ASSESSOR PHILIP E. WATSON AT 25% OF MARKET VALUE EXCEPT AS NOTED ON BACK OF BILL.

MARKET VALUE

BUS PP	835400
TOTAL	835400

ASSESSED VALUE

BUS PP	208850
TOTAL	208850

RATES AND DISTRIBUTION OF AMOUNTS BY TAXING AGENCY

TAXING AGENCY	RATE	AMOUNT
LOS ANGELES	2 5157	5254 03
COUNTY	4 0882	8538 20
UNIFIED SCHOOLS	4 7952	10014 78
JUNIOR COLLEGE	4489	937 53
FLOOD CONTROL	3552	
WATER REPLENISH	12	
WATER AGENCIES	1700	355 05
MOSQUITO ABATE	57	11 90
TOTAL	12 3801	25111 49

TOTAL TAX	25111 49
6% Penalty After Aug. 31, 1971	
Collection Costs	
Additional Penalties	
Total After Penalties	

SEE REVERSE SIDE FOR IMPORTANT INFORMATION

YOUR CANCELLED CHECK IS YOUR BEST RECEIPT

Complete the following for your records:

Date Paid Check No.

If you require an additional receipt, please check this box and return entire bill with your payment.

Exhibit B

(Extracts from 1970 Report of the Port of Los Angeles)

BALANCE SHEET June 30, 1970 and 1969

ASSETS:	1970	1969
Properties, at cost or appraised amounts including construction in progress (Note 1)	$201,959,045	$195,117,846
Less, Allowance for depreciation and amortization	45,764,003	43,422,060
	156,195,042	151,695,786
Current Assets:		
Cash on hand and on deposit with City Treasurer:		
Revenue Fund	1,569,393	1,666,681
Bond Fund (Restricted as to use)	1,310,716	1,212,030
	2,880,109	2,878,711
United States Treasury Bills, as cost, (approximate market)		
Revenue Fund	9,652,910	8,734,707
Bond Funds (Restricted as to use)	6,287,505	6,262,326
Accounts receivable, including accrued interest, less $35,000.00 allowance for doubtful accounts	2,346,812	2,721,036
Materials and supplies, at average cost	271,931	213,123
Total current assets	21,439,267	20,889,903
Deferred charges, principally deferred insurance premiums and proposed capital projects	433,451	508,469
	$178,067,760	$173,094,158

LIABILITIES:	1970	1969
Equity of the City of Los Angeles:		
Investment of funds raised by taxation	$ 31,306,519	$ 31,306,519
Capital surplus	45,848,617	45,848,617
Earned surplus	64,783,398	59,837,978
	141,938,534	136,993,114
Bond indebtedness (less due within one year) (Note 2):		
Revenue Bonds:		
Issue of 1960, maturing to 1985, interest from 3.5% to 3.9%	9,920,000	10,450,000
Second issue, maturing to 1986, interest from 2.8% to 3.5%	10,910,000	11,400,000
Issue of 1965, maturing to 1990, interest from 2.9% to 5%	10,320,000	10,640,000
	31,150,000	32,490,000
Current liabilities:		
Accounts payable and accrued expenses	3,077,096	1,773,555
Bonds outstanding, due within one year	1,340,000	1,140,000
Total current liabilities	4,417,096	2,913,555
Unamortized construction costs advanced by lessees and other credits	562,130	697,439
Commitments and Contingency (Note 3)		
	$178,067,760	$173,094,158

Exhibit B (continued)

STATEMENT OF INCOME AND EARNED SURPLUS For the years ended June 30, 1970 and 1969

GROSS REVENUES:	1970	1969
Services:		
Dockage	$ 1,353,986	$ 1,555,616
Wharfage	6,274,391	6,363,605
Storage	125,385	102,918
Demurrage	446,387	330,704
Pilotage	902,035	884,080
Assignment charges, preferential	370,986	176,495
Assignment charges, temporary	662	—
Wharf and shed revenue	454,190	331,328
Total Services	10,008,091	9,744,946
Rentals:		
Land	3,839,622	3,485,104
Pipeline rights-of-way	26,846	22,842
Special facilities	5,300	6,000
Buildings	68,077	68,129
Warehouse building rentals	514,332	425,95[illegible]
Total Rentals	4,454,277	4,009,029
Other:		
Warehouses	308,063	262,188
Municipal terminal railway	39,638	38,644
Oil royalties	207,187	217,578
Permits and concessions	37,876	36,930
Miscellaneous	6,820	6,969
Total other	599,584	562,309
Total gross revenue	15,061,952	14,315,284
OPERATING AND ADMINISTRATIVE EXPENSES:		
Revenue producing facilities	2,214,042	1,799,948
Non-revenue producing facilities	656,251	504,909
General operating	2,026,970	1,726,792
Administrative (Note 4)	2,697,848	2,294,460
Total operating and administrative expenses	7,595,111	6,326,105
Income from operations before depreciation	7,466,841	7,989,179
Less, provisions for depreciation (Note 1)	2,565,799	2,393,755
Income from operations	4,901,042	5,595,424
Other income or (expenses), net	19,692	(124,340)
	4,920,734	5,471,084
Interest income from fund investments:		
Harbor Revenue Fund	720,657	402,982
Bond Service Fund, Issue of 1960	84,881	71,795
Bond Service Fund, Second Issue	85,014	69,414
Bond Service Fund, Issue of 1965	75,830	62,519
Bond Construction Fund, Issue of 1965	210,137	269,591
Total interest income from fund investments	1,176,529	876,301
	6,097,263	6,347,385
Interest expense on bonds:		
General Obligation Bonds	—	651
Revenue Bonds, Issue of 1960	411,763	429,771
Revenue Bonds, Second Issue	378,110	390,508
Revenue Bonds, Issue of 1965	361,970	370,520
Total interest expense on bonds	1,151,843	1,190,450
Net income	4,945,420	5,156,935
Earned surplus, beginning of year	59,837,978	54,681,043
Earned surplus, end of year	$ 64,783,398	$ 59,837,978

Exhibit C

(Extracts from 1971 Report of the Port of Los Angeles)

STATEMENT OF INCOME AND EARNED SURPLUS

For the Years Ended June 30

	1971	1970
Gross revenues		
Services:		
Dockage	$1,419,800	$1,353,985
Wharfage	6,797,950	6,274,291
Storage	157,106	125,385
Demurrage	403,907	448,597
Pilotage	940,431	982,035
Assignment charges, preferential	485,298	370,968
Assignment charges, temporary	2,290	882
Wharf and shed revenue	451,823	464,180
Total services	10,639,774	10,009,081
Rentals:		
Land	4,101,817	3,639,622
Pipeline rights of way	27,023	28,948
Special facilities	3,900	3,300
Buildings	71,044	68,077
Warehouse building rentals	626,570	514,332
Total rentals	4,830,354	4,484,277
Other:		
Warehouses	407,009	308,063
Municipal terminal railway	31,550	30,638
Oil royalties	202,910	207,187
Permits and concessions	35,923	37,876
Miscellaneous	7,123	6,820
Total other	684,515	590,584
Total gross revenues	16,153,943	15,081,952
Operating and administrative expenses:		
Revenue producing facilities	2,055,348	2,214,042
Nonrevenue producing facilities	695,492	656,251
General operating	2,484,535	2,026,870
Administrative (Note 4)	3,343,840	2,697,948
Total operating and administrative expenses	8,580,215	7,595,111
Income from operations before depreciation	7,573,428	7,486,841
Less, Provision for depreciation (Note 1)	2,675,268	2,585,799
Income from operations	4,898,160	4,901,042
Other income, net (including gain on sale of land in 1971 of $314,872)	375,695	19,692
	5,273,855	4,920,734
Interest income from fund investments:		
Harbor Revenue Fund	422,172	720,687
Bond Service Fund, Issue of 1960	91,429	94,091
Bond Service Fund, Second issue	82,896	85,014
Bond Service Fund, Issue of 1965	70,204	75,830
Bond Construction Fund, Issue of 1965	91,288	210,137
Bond Service Fund, Issue of 1971	16,223	
Bond Construction Fund, Issue of 1971	152,500	
Total interest income from fund investments	926,717	1,178,529
	6,200,542	6,097,263
Interest expense on bonds:		
Revenue Bonds, Issue of 1960	393,884	411,783
Revenue Bonds, Second issue	364,942	378,110
Revenue Bonds, Issue of 1965	345,320	361,970
Revenue Bonds, Issue of 1971	220,698	
Total interest expense on bonds	1,324,844	1,151,843
Net income	4,875,698	4,945,420
Earned surplus, beginning of year	94,753,308	89,837,878
Earned surplus, end of year	$99,630,206	$94,783,308

The accompanying notes are an integral part of this statement.

STATEMENT OF CHANGES IN FINANCIAL POSITION

For the Years Ended June 30,

	1971	1970
Sources of cash:		
Operations:		
Net income	$4,875,698	$4,945,420
Add (deduct):		
Depreciation expense, which requires no outlay of cash	2,675,268	2,585,799
Decrease in deferred credits included in net income	(135,573)	(135,359)
Total cash provided from operations	7,415,393	7,375,860
Decrease in investment in United States Treasury bills	12,980,945	
Sale of Harbor Revenue Bonds, Issue of 1971	15,000,000	
Decrease in accounts receivable and accrued interest		374,224
Decrease in deferred charges		75,018
Increase in accounts payable and accrued expenses		1,303,641
	$35,396,538	$9,128,843

	1971	1970
Uses of cash:		
Increase in accounts receivable and accrued interest	$329,919	
Additions to properties, net of dispositions	9,450,294	$7,085,085
Increase in investment in United States Treasury bills		893,342
Increase in inventory of materials and supplies	11,641	58,808
Increase in deferred charges	40,895	
Redemption of bonds outstanding	1,340,000	1,140,000
Paid into General Fund of City of Los Angeles as return of investment	500,000	
Decrease in accounts payable and accrued expenses	387,924	
Increase in cash	23,336,084	1,308
	$35,396,538	$9,128,843

Appendix

Exhibit D

AMBASSADE VAN HET KONINKRIJK DER NEDERLANDEN
ROYAL NETHERLANDS
EMBASSY

4200 Linnean Avenue, N.W.
Washington, D.C. 20008
No. VA/5569 May 16, 1978

Dear Mr. Bank,

On behalf of the Governments of Denmark, Finland, France and the United Kingdom as well as on behalf of my own Government I wish to inform you that these Governments share the concern expressed in the aide-mémoire of March 27 of the Embassy of Japan regarding the imposition by the State of California of property tax on containers owned by foreign shipping lines.

The possibility that an example set in this respect by the State of California may be followed in other States is viewed by the aforementioned Governments with considerable apprehension.

Sincerely Yours,

/s/ JAN KROL
JAN KROL
Chairman, Cotton Club

Mr. Richard K. Bank
Director,
Office of Maritime Affairs
Department of State
Room 5826
2201 C Street, N.W.
Washington, D.C. 20520

Exhibit E

BOTSCHAFT DER
BUNDESREPUBLIK DEUTSCHLAND

Washington, den
May 25, 1978
Ne/tu

Mr. Richard Bank
Office of Maritime Affairs
Department of State
Washington, D. C. 20590

Dear Richard,

As already discussed on the phone, I would like to let you know that the Federal Republic of Germany is associating itself with the letter of the Chairman of the Cotton Club concerning California Property Tax on foreign containers.

I would like to add that we would consider it a serious burden on international commerce if local or state taxation would distort costs of service. To avoid such difficulties would be in the interest of an unimpeded cargo flow and would thus promote the trade between our countries.

I understand that the issue is pending before the Supreme Court of the United States and that there are legislative proposals pending in the Legislature of California to extend the exemption for foreign containers beyond 1978.

It would be appreciated if the Department of State could convey this message to the pertinent authorities here in the United States.

Sincerely yours,

2) H. Thilo zgK
3) z. Vorg.

Exhibit F

ROYAL NORWEGIAN EMBASSY
1401 Massachusetts Avenue, N.W.
Washington D. C. 20007
4200 Wisconsin Ave., N.W.,
Washington D. C. 20016

AB/ts 25 July 1978.

Mr. Richard Bank
Director,
Office of Maritime Affairs
Department of State
Washington D.C. 20520.

Dear Richard,

Referring to a recent telephone conversation between Mr. Carl Taylor of your office and Mr. Finn Bergesen of this Embassy, I would hereby like to confirm that Norway associates itself with the Chairman of the Cotton Club's letter to you of 16 May, 1978, concerning the State of California's introduction of property taxation of ship containers.

Sincerely yours,

Alf Bergesen
Counselor Shipping
and Civil Aviation

Exhibit G

March 13, 1978

TENTATIVE PROPOSAL OF STATE BOARD OF EQUALIZATION
FOR PUBLIC HEARING IN JUNE 1978

Rule No. 202. (Cal. Adm. Code) Allocation of Aircraft of Certificated Air Carriers and Scheduled Air Taxi Operators

(a) Air taxis. An aircraft whose owner on the lien date used it in scheduled air taxi service at any time during the representative period selected pursuant to subsection (f), or which has been purchased for scheduled air taxi service but not yet put into such service and not yet used in any other service, is assessable under sections 1150 and 1156 of the Revenue and Taxation Code and not under Part 10, Division 1, or under other situs provisions of Part 2, Division 1, of the Revenue and Taxation Code.

(b) Situs. Aircraft operated by certificated air carriers (within the meaning of section 1150 of the Revenue and Taxation Code) or scheduled air taxis (within the meaning of subdivisions (a) and (b) of section 1154 of the Revenue and Taxation Code) and flown in intrastate, interstate, or foreign commerce shall be deemed to be situated only in those taxing agencies (within the meaning of section 404 of the Revenue and Taxation Code) in which the aircraft normally make physical contact. The physical contact must be intentional rather than by accident or as the result of an emergency, and it must involve embarking or disembarking of crew, passengers, or freight.

Aircraft flying over the state without landing do not acquire situs for property tax purposes. Conversely, the situs of aircraft that depart from a taxing agency within the state, fly out of the state, and return to the same or another taxing agency within the state without landing outside the state is within the state's taxing jurisdiction throughout the flight.

Situs for property tax purposes is not affected by the legal or commercial domicile of the operator of the aircraft, nor by the fact that the aircraft is operated solely in foreign commerce.

(c) Allocation formula. The allocation formula to be used by each assessor is composed of two factors: (1) ground and flight time and (2) aircraft arrivals and departures.

Time allocable to an airport is the amount of time that certificated aircraft and scheduled air taxis are on the ground at the arport, plus a portion of the incoming and outgoing flight time computed pursuant to subsection (d). The ratio of the time allocable to the airport during a representative period to the sum of the time allocable to the airport and the time allocable elsewhere is the ground and flight time factor. In computing the ground and flight time factor, the following shall be excluded:
From the time allocable to the airport—

(1) All ground and flight time prior to the aircraft's first entry into the revenue service of the air carrier in control of the aircraft on the current lien date.

(2) All ground time in excess of 12 consecutive hours at the airport following entry into revenue service.

From the total time—

(1) All ground and flight time prior to the aircraft's first entry into the revenue service of the air carrier in control of the aircraft on the current lien date.

This factor shall be multiplied by 75 percent to obtain a weighted ground and flight time factor.

The aircraft arrivals and departures factor is the ratio of the number of arrivals at and departures from an airport during a representative period to the total number of arrivals at and departures from all airports during the representative period. This factor shall be multiplied by 25 percent to obtain a weighted arrivals and departures factor.

The weighted time factor shall be added to the weighted arrivals and departures factor. The sum of the two weighted factors yields the allocation ratio to be applied to the full cash value of the aircraft to determine the full cash value allocable to the airport.

(d) Allocation of Flight Time. For aircraft flying from one California airport to another California airport, the flight time attributable to each airport is one-half the flight time between the airports.

For aircraft arriving from an airport outside the state or leaving for an airport outside the state, the flight time from or to the state boundary shall be allocated to the California airport in which the aircraft first lands or last takes off, as the case may be. The flight time to the state boundary shall be computed as follows: (1) determine the mileage from the airport to the state boundary crossing point on a great circle flight to the first landing point outside the state; (2) divide this mileage by the total great circle mileage from the airport to the first landing point

outside the state; (3) multiply this percentage by the total flight time from the airport to the first landing point outside the state. The same procedure shall be used for inbound flights from outside the state. To allow for differences in take-off, landing, and cruising speeds and for varying take-off and landing patterns, the time allocated to an airport shall not be less than five minutes for an incoming or an outgoing flight. In lieu of the actual flight time for a single flight, the average flight time between two ports, or between a port and the state line, for two or more flights of a single carrier or of more than one carrier shall be used when such an average is promulgated by the board unless the assessor has determined evidence which justifies departure from such average time.

(e) Sources of Allocation Data. For scheduled operations, arrivals and departures and ground and flight time shall be derived from the carrier's operating schedules. For nonscheduled operations, including, but not limited to, overhaul, pilot training, charter, military contract flights, and standby services, ground and flight time and arrivals and departures shall be derived from the carrier's recorded operations.

(f) Representative Period. Annually, on or before February 15, the board shall consult with the assessors of the counties in which air carriers' aircraft normally make physical contact. On or before March 1, the board shall designate a representative period to be used by all assessors in assessing the aircraft of each carrier for the forthcoming fiscal year.

(g) Application of Allocation Formula. The aircraft of certificated air carriers and scheduled air taxi operators shall be segregated by type, and a separate allocation ratio

shall be computed for each type which has established a tax situs within the state, excluding those makes within a type which have not established a tax situs within the state. Each allocation ratio shall then be applied to the total value of the carrier's aircraft of each type to which the allocation ratio applies, excluding those makes within a type which have not established a tax situs within the state.

The types are as follows:

(1) Piston-powered

(2) Turboprop-powered

(3) Helicopter

(4) Turbojet and Turbofan powered

(A) Two engine

(B) Three engine

(C) Four engine

(D) DC-8-60 series

(E) Boeing 747

(F) DC-10 and L 1011

• • •

Exhibit H

UNOFFICIAL TRANSLATION

The Embassy of Mexico presents its compliments to the Department of State and has the honor to refer the Department of State to a March 24, 1978 letter from the California State Board of Equalization (copy attached). Annexed to this letter is a proposed amendment to the California Tax Regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Government of Mexico respectfully submits that the imposition of a property tax on aircraft owned by foreign airlines operating into and out of California would directly contravene the United States' treaty obligations set forth in Article 24 of the Convention on International Civil Aviation (the "Chicago Convention") and the United States' representations to the other Contracting States of the Convention with respect to the exemption from property taxes on aircraft engaged in international air transportation, as set forth in the supplement to ICAO Document 8632-C/968.

The Government of Mexico respectfully invites the attention of the Department of State to the language of Article 24 of the Chicago Convention which states

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that "aircraft on a flight to, from, or across territory of another contracting State are to be admitted temporarily free of duty. . ." In the considered opinion of the Government of Mexico, the exemption from "duty" provided by

the Convention must necessarily include an exemption from property taxes, whether attempted to be imposed by the United States of America itself or by any individual State or political subdivision thereof. If this were not so, the exemption from "duty" would have little practical value or meaning.

The attention of the Department of State is also invited to Section III of the ICAO "Council Resolution of 14 November 1966 on Taxation of the Income of International Air Transport Enterprises and on Taxation of Aircraft," and particularly Clause (1) (b) thereof, which states:

> "(1) *Each Contracting State shall,* to the fullest extent possible, *grant* reciprocally
>
> (b) *Exemption from property* taxes, and capital levies or other similar taxes, *on aircraft of other Contracting States engaged in interna-*
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> *tional air transport*; . . ." (Emphasis supplied).

In further accordance with this Resolution, the Department of State is reminded that each Contracting State, including the United States, was to notify ICAO of the extent to which it was prepared to take action in accordance with the principles of this Resolution. In this regard, the United States specifically and unequivocally represented to the other Contracting States of ICAO that:

> "The United States is in accord with the principles set forth in this Clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this Clause through bilateral agreements with other countries, or, in appropriate cases, by means of administrative rulings."

The United States' statement then declares that such agreements have been concluded today with over forty countries, including Mexico. Thus, it is respectfully the opinion of the Government of Mexico that the United States has already committed itself to a practice of exempting aircraft operating under the flag of Mexico and which are engaged in international air transporta-

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tion from the levy of any property tax within the United States.

The Government of Mexico would also invite the Department of State's attention to the consideration of various policy factors which are necessarily germane to this issue: First, aircraft operating in international air transportation under the flag of Mexico are already subject to full taxation in Mexico. Thus, if property tax were to be imposed by the United States or any individual State or political subdivision thereof, the aircraft would thus be doubly taxed—by the Government of Mexico and also by the United States. Such a tax burden is both unfair to the air transport enterprises involved and also a frustrating, but preventable, impediment on the smooth development of trade and travel between our two countries. It is indeed the very purpose for which Section III of the ICAO Council Resolution of 14 November 1966 was formulated and approved.

In the particular case of Mexico and the United States, there is an agreement effected by exchange of notes signed at Washington August 7, 1964 and applicable with taxable years beginning on or after January 1st, 1964 for the re-

lief from double taxation on earnings from operation of ships and aircraft, through reciprocal exemption.

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Although the agreement only covers federal income taxes, we believe that the imposition of a tax on capital represented by the aircraft is of such analogous character that it would substantially violate the spirit of our agreement and consequently give rise to its possible termination according to point four of both exchange notes.

When the agreement was being negotiated, the Ministry of Foreign Affairs of Mexico specifically raised the issue of state or local authorities contravening the agreement by imposing taxes on ships and aircrafts, and although it was not inserted into the agreement, it was thought that the proper remedy for such violation would be the termination of the agreement.

Secondly, it seems clear to the Government of Mexico that the imposition of a property tax on the aircraft of non-U.S. airlines operated to or from the United States of America in foreign commerce could immediately lead to the taxation of aircraft of U.S. airlines by foreign governments and their local political subdivisions. Once the United States abandons the principle of reciprocal exemption from property taxation of aircraft, there is little reason other governments will have to refrain from imposing similar property taxes. No one stands

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to gain from such an escalation of trade barriers as would come about, least of all carriers of the United States which would find themselves with aircraft subject to property tax in many foreign jurisdictions.

The Government of Mexico is deeply concerned about the possible international complications which could result

if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. The Government of Mexico respectfully urges the Government of the United States to take immediate and appropriate action to prevent the imposition of a property tax on foreign-registered aircraft by the State of California, in order to assure continued growth and development of trade and other relations between our two countries. This is specially important at a moment in which our two countries have just signed a new agreement in civil aeronautics that responds to the philosophy of both our Governments with respect to the substantial lowering of the rates for air transportation as an effective means of bringing our people together. The proposed tax by the State of California would set an ominous example to other local authorities and would certainly seem to negate the declared international policy of the Carter Administration with

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respect to the elimination of non-tariff trade barriers.

The Embassy of Mexico believes that the proper forum for the United States Government to oppose such action, will be the hearing that the California State Board of Equalization will hold in Sacramento June 29, 1978. In this respect, there is a position developed by the Administration on a parallel case and embodied in the letter that on December 19, 1977 the General Counsel of the Office of the Special Representative for Trade Negotiations, Mr. Richard Rivers, addressed to Attorneys Sheldon Cohen and Peter Briger on the subject of foreign oceangoing containers taxed by local governmental units of the State of California. (copy of this letter is also attached).

Washington, D.C., June 15, 1978.

Encls.

Exhibit I

EMBASSY
OF THE
FEDERAL REPUBLIC OF GERMANY
WASHINGTON, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to inform the Department of the following matter:

By circular letter, dated March 24, 1978 the California State Board of Equalization has expressed its intent to assess property taxes against foreign owned and operated aircraft employed in the foreign commerce of the United States and using facilities in California. A proposed Amendment to the California Tax Regulations is pending.

This Embassy has been instructed to express the strong concern of the Government of the Federal Republic of Germany that this tax if imposed will constitute an undue burden on and impediment to the flow of international traffic and Commerce and will be in violation of multilateral and bilateral international Commitments of the United States of America.

Article 24 of the "Chicago Convention" provides that aircraft of contracting parties be admitted temporarily to the territory of other contracting parties free of duty. Both the Federal Republic of Germany and the United States are parties to that convention.

It is the position of the Government of the Federal Republic of Germany that, as far as this provision is concerned, no difference can be made between State—or Fed-

eral Taxes—or duties in the United States. Article 24 is intended to facilitate international air transportation, its purpose would be destroyed if its commitment would only bind the federal authorities. It seems obvious that such a result would be in contradiction to the intentions of the contracting parties.

Furthermore, Paragraph 1 (b), Section III of the ICAO Council Resolution of November 14, 1966 requires that member countries grant each other exemption from property taxes for aircraft engaged in International Air Transportation on the basis of reciprocity. The Government of the United States informed ICAO that it adheres to this principle either by bilateral agreements or through administrative rulings. There are no taxes assessed against foreign Aircraft in the Federal Republic of Germany.

Article 7 of the Air Transport Agreement between the Federal Republic of Germany and the United States of America of July 7, 1955 stipulates that certain activities and transactions connected with the operation of German civil aircraft on the territory of the United States of America be exempted from duties, fees and charges. Aircraft as such are not mentioned in the Bilateral Agreement. This is due to the fact (as reflected by the proceedings of the negotiations in 1955) that both contracting parties agreed that the exemption of aircraft is covered by Article 24 of the Chicago Convention. An inclusion in the Bilateral Agreement was therefore considered not to be necessary.

This Embassy wishes to point out that the question whether the exemption of Article 7 applies only to Federal and not to State taxes in the USA has been disputed before. The Government of the Federal Republic of Germany wishes to reiterate its position that according to its inter-

pretation of the Treaty, Federal, State and Local taxes are covered by the exemption.

The imposition of State Taxes on German aircraft in California would raise serious doubts whether the principle of reciprocity which governs the exemption of US-aircraft in the Federal Republic of Germany is still maintained and would lead to a reevaluation of that situation by German tax authorities. Furthermore, apart from the distortion of cost structures between airports the California tax example might induce other States to levy comparable taxes on foreign aircraft and eventually on other modes of international transportation as well. Retaliation by other countries might then subject international carriers to multiple taxation which would be clearly in contradiction to efforts to facilitate international Commerce.

Washington, D.C., June 23, 1978

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Exhibit J

California Property Tax

(Note to State Department)

June 19, 1978

The Canadian Embassy presents its compliments to the Department of State and has the honour to refer to a circular of the California State Board of Equalization dated March 24, 1978, pertaining to an amendment to the California Tax Regulations. The purpose of this amendment is to enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Canadian Embassy wishes to express the concern of the Canadian Government at the apparent inconsistency of this proposal with the Convention on International Civil Aviation to which both Canada and the United States are parties and of which Article 24 specifically states that "aircraft on a flight to, from, or across the territory of another Contracting State shall be admitted temporarily free of duty". It is the understanding of the Canadian Government that this exemption applies to any form of taxation, whether imposed by national or state authorities. It will also be noted that Article 15 of the same Convention stipulates that "no fees, dues or other charges shall be imposed by any Contracting State in respect only of the right of transit over or entry or exit from its territory for any aircraft".

The Government of Canada wishes furthermore to draw the attention of the Government of the United States to

Section III of the ICAO Council Resolution of the taxation of income of international air transport enterprises and the taxation of aircraft, and particularly to paragraph 1(B) of that section, whereby "each Contracting State shall, to the fullest extent possible, grant reciprocally . . . exemption from property taxes . . . on aircraft of other Contracting States engaged in international air transport". The Government of the United States will also recall its statement in that connection to the effect that it "is in accord with the principles set forth in this clause" and that it has "for a long period of time followed the practice of granting the exemptions provided for in this clause through bilateral agreement wtih other countries, or, in appropriate cases, by means of administrative ruling".

The Government of Canada wishes furthermore to refer to the Air Transport Agreement between Canada and the United States of January 17, 1966, as amended, and particularly to Article XI of that Agreement, which stipulates that "each Contracting Party shall exempt the designated airlines of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, inspection fees and other national duties . . .". While this provision does not explicitly rule out a state-imposed property tax on Canadian aircraft used in international service, it will be clear that such a tax would negate the very intent of this provision and that it would introduce a new element in regard to the equitable exchange of benefits expected to be derived from that Agreement.

It will be apparent that the Canadian Government is concerned at the repercussions of a proposal, which, if enacted, would open the way to similar application by the authorities of other states. As, moreover, Canadian air-

craft are already fully taxed in Canada, the application of such a tax by any state would result in double taxation, the effect of which would be to alter the present position of reciprocity. It is finally clear that the imposition of such a tax, in addition to introducing a potentially destabilizing factor in air relations, would place on foreign airlines, and in particular on Canadian airlines in view of the extensiveness of air service between our two countries, an additional and substantial burden at a time when those airlines are engaged in making air travel more readily accessible to the travelling public.

The Government of Canada hopes that these concerns will be taken into account by the Government of the United States and that, should the intention of the California State Board of Equalization be confirmed, appropriate action would be taken by the Government of the United States of America to prevent the imposition of a property tax on foreign aircraft by the State of California.

The Canadian Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Exhibit K

The Embassies of Denmark, Norway and Sweden present their compliments to the Department of State and have the honour to refer the Department of State to a March 24, 1978 letter from the California State Board of Equalization (copy attached). Attached to this letter is a proposed amendment to the California Tax Regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Governments of Denmark, Norway and Sweden submit that the imposition of a property tax on aircraft owned by foreign airlines operating into and out of California would be contrary to the obligations set forth in Articles 15 and 24 of the Convention on International Civil Aviation and the United States representations to the other Contracting States of the Convention with respect to the exemption from property taxes on aircraft engaged in international air transportation, as set forth in the Supplement to ICAO Document 8632-C/968. The attention is invited in particular to Clause (1) (B) Section III of the ICAO Document containing Council Resolution of 14 November 1966 on Taxation of the Income of International Air

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Transport Enterprises and on Taxation of Aircraft. In accordance with this Resolution, each Contracting State, were to notify ICAO of the extent to which it was prepared to take action in accordance with the principles of this Resolution. In this regard, the United States represented to the other Contracting States of ICAO that:

> "The United States is in accord with the principles set forth in this Clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this Clause through bilateral agreements with other countries, or in appropriate cases, by means of administrative rulings".

The United States' statement then went on to declare that such agreements had been concluded today with several countries. Thus, it is the opinion of the Governments of Denmark, Norway and Sweden that the United States has already adopted a policy of exempting aircraft which are engaged in international air transportation from the levy of any property tax within the United States.

The Governments of Denmark, Norway and Sweden would also like to note various policy factors which are relevant to this issue. Aircraft operating in international air transportation under the flag of Denmark, Norway or

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Sweden are already subject to full taxation in those countries. If a property tax were to be imposed by the United States or any individual State or political subdivision thereof, the aircraft would be doubly taxed. Such a double tax burden would be unfair to the air transport enterprises involved and would also be an impediment to the development of trade and travel between our countries. The avoidance of such a situation was the purpose for which Section XXI of the ICAO Council Resolution of 14 November 1966 was formulated and approved.

Furthermore, it seems clear to the Governments of Denmark, Norway and Sweden that the imposition of a property tax on the aircraft of non-U.S. airlines operated to

and from the United States may lead to taxation of aircraft of U.S. airlines by foreign Governments and their local political subdivisions. No one stands to gain from such an escalation of trade barriers.

The Governments of Denmark, Norway and Sweden are deeply concerned with the possible international complications which could result if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. The Governments of Denmark, Norway and Sweden urge the Government of the United States to make immediate and appropriate action to prevent the imposition of a property tax on foreign aircraft by the State of California in order to assure continued growth and development of trade and other relations between our countries.

Washington, D.C.
June 13, 1978

Exhibit L

28 Juin 1978.

L'Ambassade de France présente ses compliments au Département d'Etat et a l'honneur de lui exposer ce qui suit:

L'Ambassade de France a été informée de l'intention de l'Administration des Impôts de l'Etat de Californie (California State Board of Equalization) de modifier la réglementation fiscale de cet Etat afin de permettre à ce dernier, ainsi qu'aux contrôleur locaux des contributions, de lever une taxe sur la propriété des avions appartenant aux compagnies aériennes étrangères qui exploit un service commercial de et vers la Californie, projet rendu publie par une lettre circulaire de l'Administration des Impôts de l'Etat de Californie en date du 24 Mars 1978.

La taxe envisagée serait imposée par les Autorités financières locales et celles de l'Etat de Californie sur des appareils affectés au trafic international par les compagnies aériennes étrangères et celle ne serait fondée sur le coût d'aucun service rendu.

Les Autorités françaises rappellent qu'elles n'imposent à aucun niveau, de taxes similaires aux avions appartenant aux compagnies aériennes étrangères et notamment américaines exploitant de et vers la France.

Elles estiment donc que l'imposition de cette taxe aux appareils appartenant aux compagnies françaises constituerait une discrimination contraire aux dispositions du Protocole de signature de l'Accord entre la France et les Etats-Unis d'Amérique relatif aux services aériens entre

leurs territoires respectifs signé à Paris le 27 Mars 1946. Ce Protocole stipule en effet:

"Il est apparu, au cours des négociations ayant abouti à la conclusion de l'Accord relatif aux services aériens entre les territoires français et les territoires des Etats-Unis d'Amérique signé à Paris en date de ce jour, que les représentants des deux Parties contractantes étaient d'accord sur les points suivants:

1) Les entreprises aériennes des deux Parties contractantes exploitant les lignes mentionnées à l'annexe au dit Accord doivent pouvoir bénéficier de possibilités égales pour l'exploitation desdites lignes".

L'imposition de la taxe envisagée entraînerait en outre un déséquilibre des accords de double imposition existants et en cours de négociation entre les deux pays.

Les Autorités françaises demandent en conséquence aux Autorités américaines que les entreprises aériennes françaises soient exemptes du champ d'application de la taxe proposée. Elles rappellent à ce propos que, dans l'échange de lettres du 28 Juillet 1967, annexe à la Convention Franco-Américaine en matière d'impôt sur le revenu et la fortune, le gouvernement des Etats-Unis a donné l'assurance qu'il interviendrait auprès des Etats-Unis Fêdérés si ceux-ci entendaient soumettre nos compagnies aériennes à des impôts locaux, en échange de l'assurance que nous apportions de ne pas soumettre à la patente les compagnies américaines.

Les Autorités françaises souhaitent également appeler l'attention des Autorités américaines sur la section III paragraphe (B) de la résolution du Conseil de l'OACI en date du 14 Novembre 1966 qui dispose que "chaque Etat contractant doit accorder dans toutes la mesure du possible, moyennant réciprocité B) l'exemption des charges fiscales frappant la propriété et le capital ou de toute espèce de charges fiscales analogues perçues sur les aéronefs d'autres Etats contractants effectuant des transports aériens internationaux". A la suite du vote de cette résolution, les Autorités américaines ont déclaré de manière précise et non équivoque aux autres Etats contractants de l'OACI qu'elles étaient d'accord sur le principe précité et avaient, de longue date et conformément à leur législation, accordé l'exemption prévue par cette résolution au moyen d'accords bilatéraux avec d'autres pays ou de mesures administratives appropriées.

Une telle taxe serait, de surcroît, incompatible avec le principe de la non discrimination prévu par la Convention de Chicago, notamment en son article 15 qui stipule en particulier: "Aucun Etat contractant ne doit imposer de droits, taxes ou autres redevances uniquement pour le droit de transit, d'entrée ou de sortie de son territoire de tout aéronef d'un Etat contract."

Les Autorités françaises souhaitent souligner que si l'imposition de cette taxe était autorisée, d'autres Etats Fédérés des Etats-Unis pourraient également vouloir mettre en vigueur une taxe analogue, ce qui aggraverait lourdement les coûts d'exploitation des entreprises de transport aérien françaises—qui sont déjà imposées en France—au détriment des intérêts non seulement de ces compagnies mais aussi de public.

Elles estiment enfin que l'imposition d'une telle taxe risque d'entraîner, de la part des Autorités locales ou centrales d'autres Etats étrangers, des mesures de taxation analogues ayant pour effet d'apporter une entrave au développement du transport aérien.

A la lumière de ces observations, les Autorités françaises seraient reconnaissantes au Département d'Etat de bien vouloir les informer des actions que les Autorités américaines comptent entreprendre pour prévenir l'imposition par l'Etat de California d'une taxe sur la propriété des avions étrangers./.

L'Ambassade de France saisit cette occasion pour renouveler au Département d'Etat les assurances de sa très haute considération.

Exhibit M

EMBASSY OF JAPAN
WASHINGTON
July 20, 1978

AIDE-MEMOIRE

The Board of Equalization of the State of California has recently proposed an amendment to Section 202 of its Tax Regulation which would enable the State of California and its local county assessors to levy a local property tax on foreign aircraft engaged in air service to and from the State of California. With regard to the proposed tax, the Japanese Government invites the attention of the U.S. Government to the following points and hopes that, with a view to developing and maintaining smooth commercial relations between our two countries, the U.S. Government would take appropriate measures to prevent this taxation.

1. Article 24 of the Convention on International Civil Aviation, which stipulates mutual exemption of duties among contracting countries, and other articles of Chapter 4 of the Convention set forth measures to facilitate the smooth operation of international civil air transportation. This proposed taxation would be in contradiction to the fundamental concepts envisaged in Chapter 4 of the Convention because it would be a barrier to the smooth operation of international civil air transport services.

2. While Paragraph 1(b), Section III of the ICAO Council Resolution of November 14, 1966, requires that member countries grant each other exemption from property taxes for aircraft engaged in international air services and the

U.S. Government, in this respect, explicitly announced that it would adhere to the principles set forth in this Resolution, it seems that the proposed tax would not go along with the spirit of the Resolution.

3. As to municipal taxes in Japan which correspond to the proposed tax, no such taxes are assessed at present against foreign aircraft in Japan. If this proposed tax is implemented, an inconsistency would therefore be brought about between the two countries in connection with the imposition of taxes on foreign aircrafts. This situation could interfere with the smooth commerce between our two countries and, accordingly, the Japanese Government is deeply concerned about the future development of this matter.

Exhibit N

The Netherlands Ambassador presents his compliments to the Honourable the Secretary of State and has the honor to draw Mr. Vance's attention to the following matter.

In view of a proposed amendment to the California tax regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California, I may draw your attention to the following.

The Government of the Netherlands submits that the imposition of a property tax on aircraft owned by foreign airlines operating into and out of California would directly contravene the United States' treaty obligations set forth in article 24 of the Convention on International Civil Aviation (the so-called "Chicago Convention") and the United States' representations to the other contracting States of the Convention with respect to the exemption from property taxes on aircraft engaged in international air transportation as set forth in the supplement to ICAO document 8632-6/968.

The Government of the Netherlands invites the attention of the Department of State to the language of article 24 of the Chicago Convention which states that "aircraft on a flight to, from, or across territory of another contracting State are to be admitted temporarily free of duty . . . .". In the considered opinion of the Government of the Netherlands, the exemption from "duty" provided by the Convention must necessarily include an exemption from property taxes, whether attempted to be imposed by the United States of America itself or by any individual State or

political subdivision thereof. If this were not so, the exemption from "duty" would have little practical value or meaning.

The attention of the Department of State is furthermore drawn to section iii of the ICAO "Council Resolution of 14 November 1966 on taxation of the income of international air transport enterprises and on taxation of aircraft," and particularly clause (1)(b) thereof, which states:

> "(1) *each contracting State shall,* to the fullest extent possible, *grant* reciprocally
>
> (b) *exemption from property taxes,* and capital levies or other similar taxes, *on aircraft of other contracting States engaged in international air transport . . .*" (emphasis supplied).

In further accordance with this resolution, the Department of State is reminded that each contracting State, including the United States, was to notify ICAO of the extent to which it was prepared to take action in accordance with the principles of this Resolution. In this regard, the United States specially and unequivocally represented to the other contracting States of ICAO that:

> "the United States in accord with the principles set forth in this clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this clause through bilateral agreements with other countries, or, in appropriate cases, by means of administrative rulings".

The United States' statement then declared that such agreements have been concluded today with several countries.

Thus, it is the opinion of the Government of the Netherlands that the United States has already committed itself to a practice of exempting aircraft under foreign flag and which are engaged in international air transportation from the levy of any property tax within the United States.

The Government of the Netherlands would also invite the Department of State's attention to the consideration of various policy factors which are necessarily germane to this issue. First, aircraft operating in international air transportation under the flag of the Netherlands are already subject to full taxation in the Netherlands. Thus, if a property tax were to be imposed by the United States or any individual State or political subdivision thereof, the aircraft would thus be doubly taxed. Such a tax burden is both unfair to the air transport enterprises involved and also a frustrating but preventable, impediment on the smooth development of trade and travel between our two countries. It is indeed the very purpose for which section iii of the ICAO Council Resolution of 14 November 1966 was formulated and approved.

Finally, it seems evident that the imposition of a property tax on the aircraft of non-US airlines operated to or from the United States of America in foreign commerce may lead to the taxation of aircraft of US airlines by foreign Governments and their local political subdivisions.

Once the United States abandons the principle of reciprocal exemption from property taxation of aircraft, there is little reason other Governments will have to refrain from imposing similar, retaliatory property taxes. No one stands to gain from such an escalation of trade barriers as would come about, least of all carriers of the United States which

may find themselves with aircraft subject to property tax in many foreign jurisdictions.

The Government of the Netherlands is deeply concerned with the possible international complications which could result if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. The Government of the Netherlands urges the Government of the United States to take immediate and appropriate action to prevent the imposition of a property tax on foreign-registered aircraft by the State of California in order to assure continued growth and development of trade and other relations between our two countries.

Washington D.C.
June 9, 1978

Exhibit O

The Embassy of New Zealand presents its compliments to the Department of State and has the honour to refer to the proposed amendment to the California tax regulations which would enable the State of California to levy a property tax on aircraft owned and operated by foreign airlines engaged in foreign commerce to and from the State of California.

Air New Zealand is designated by the Government of New Zealand to operate from New Zealand via certain intermediate points to Los Angeles, California, pursuant to the provisions of the 1964 New Zealand-United States Air Transport Agreement. Article 7 of that Agreement exempts, on the basis of reciprocity, essential support equipment from customs duties, excise taxes, inspection fees and other national duties or charges. The intent and spirit of this Article is "to prevent discriminatory practices and to assure equality of treatment . . ." and it is the belief of the New Zealand Government that the proposed tax is contrary to that spirit and intent. This would seem to be the view also of the United States Government when it advised ICAO of the extent to which it was prepared to take action in accordance with the principles of Section III of the ICAO Council resolution of 14 November 1966 on Taxation of the Income of International Air Transport Enterprises and on Taxation of Aircraft. That section *inter alia* urges contracting states to grant reciprocally, to the fullest extent "exemption from property taxes, and capital levies or other similar taxes on aircraft of other contracting states engaged in international air transport." The United States stated that it is "in accord with the principles set forth in this clause and, in accordance with its

existing laws, has for a long period of time followed the practice of granting the exceptions provided for in this clause through bilateral agreements with other countries . . ." The United States then included New Zealand in the list of countries with which it had concluded such agreements to grant the exemptions provided in Section III of this resolution, namely exemption *inter alia* of aircraft from property tax.

Furthermore, Article 24(A) of the Convention on International Civil Aviation 1944 specifically requires that aircraft of another contracting state "shall be admitted temporarily free of duty, subject to the customs regulations of the state". Both New Zealand and the United States are parties to the Convention and are bound to observe the obligations imposed by this Article regardless of whether local or national "duty" is involved. In New Zealand's view the word "duty" as used in Article 24(A) is sufficiently wide to cover the proposed property tax and the proviso relating to customs regulations refers only to administrative procedures such as "customs supervision" as is pointed out later on in the same paragraph. This view is confirmed by the 1966 Council resolution referred to above.

The New Zealand Government is concerned that if the State of California is permitted to impose the property tax on aircraft engaged in foreign commerce, the New Zealand Government will have no option but to consider taking appropriate action to ensure that its designated airline is not disadvantaged. The proposed action of the State of California could be responsible for a chain reaction that can only increase airline costs and inevitably lead to significant increases in the fares, rates, and charges for international travel by air between our two countries.

In view of all these considerations the New Zealand Government would appreciate clarification from the Government of the United States as to what action it proposes to take in respect of the property tax on foreign aircraft proposed by the State of California.

The Embassy of New Zealand avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

[Embassy Seal]

Embassy of New Zealand,
Washington, D.C.
19 June, 1978

Exhibit P

Note No. 153

Her Britannic Majesty's Embassy presents its compliments to the Department of State and has the honour to refer to a circular letter from the California State Board of Equalization dated 24 March 1978 which gives notice of a proposed amendment to the California Tax Regulations. This proposal is intended to enable the State of California and the local county assessors of California to levy property tax ("The Proposed Tax") on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Proposed Tax falls within the scope of Article 8(5) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Air Services signed at Bermuda on 23 July 1977, as amended. The Proposed Tax would be a tax imposed by State and local authorities on aircraft operated in international air services by the designated airlines of the United Kingdom and it would not be based on the cost of any services provided. Her Majesty's Government therefore calls on the United States Government to use its best efforts to secure exemption from The Proposed Tax for the designated airlines of the United Kingdom.

In addition, Her Majesty's Government maintain that the imposition of The Proposed Tax would be in contravention of Article 24 of the Convention on International Civil Aviation (the "Chicago Convention") to which the Governments of the United Kingdom and the United States are parties.

Article 24 requires aircraft of other Contracting Parties to be admitted temporarily free of duty. This provision must be taken to include exemption from any form of taxation whether levied at the national or state level.

Her Majesty's Government would also draw to the attention of the United States Government to Section III of the ICAO Council Resolution of 14 November 1966 on taxation of the income of international air transport enterprises and the taxation of aircraft. Under Paragraph 1(B) of this Section Contracting States are required reciprocally to grant exemption from property taxes on aircraft of other Contracting States engaged in international air transport. The United States Government has represented to the other Contracting States of ICAO that it "has for a long period of time followed the practice of granting . . . through bilateral agreements with other countries or, in appropriate cases, by means of administrative rulings . . . the exemptions provided for" in this Section.

Her Majesty's Government is concerned that if the State of California is permitted to take this action other States may follow suit and that there may be proliferation within the United States of similar local taxes on their designated airlines. No comparable tax is imposed on aircraft of United States designated airlines by any authority within the United Kingdom. Imposition of The Proposed Tax would therefore alter the present position of reciprocity and would lead to an element of double taxation of United Kingdom designated airlines which would disturb the equilibrium of existing and proposed double taxation agreements between our two countries.

In the light of these considerations, Her Majesty's Government would be grateful if they could be informed of what action the United States Government is taking to prevent imposition of a property tax on foreign aircraft by the State of California.

The Embassy avails itself of this opportunity to renew the assurances of its highest consideration.

[SEAL]

BRITISH EMBASSY
WASHINGTON, D.C.

7 June 1978

Exhibit Q

DEPARTMENT OF JUSTICE
TAX DIVISION
104 State Office Building
Salem, Oregon 97320
Telephone: (803) 376-4494

January 31, 1978

Mr. Lindy Freeman
Division of Assessment & Taxation
Room 136
Multnomah County Courthouse
Portland, Oregon 97204

Re: Personal Property Tax on Cargo
Containers

Dear Mr. Freeman:

This opinion is in response to a question presented by your office concerning cargo containers.

QUESTION PRESENTED

Are cargo containers used in interstate and foreign commerce subject to personal property ad valorem tax assessment?

ANSWER GIVEN

Cargo containers continuously present in Multnomah County are not constitutionally immune from an apportioned personal property ad valorem tax. Neither do these cargo containers qualify for exemption under Oregon's free port law, ORS 307.810.

DISCUSSION

You have asked whether cargo containers used on container ships in interstate and foreign commerce can be assessed under the personal property ad valorem tax. Taxpayers have claimed that these containers are either immune under the protection of the United States Constitution or are exempt under Oregon's free port law.

To support their position of constitutional immunity, taxpayers have cited a decision by the Superior Court of California. *Japan Line, Ltd.* v. *County of Los Angeles,* 132 Cal Rptr 531 (L.A. County 1973). However, the Supreme Court of California recently reversed their superior court's decision. *Japan Line, Ltd.* v. *County of Los Angeles,* 141 Cal 905 (1977). The California Supreme Court held that an apportioned ad valorem tax on the cargo containers violated neither the Commerce Clause, the Import-Export Clause nor the Supremacy Clause of the United States Constitution. A copy of this recent decision and a copy of an earlier decision in *Sea-Land Service, Inc.* v. *County of Alameda,* 117 Cal2d 448, 528 P2d 56 (1974) are enclosed. Assuming that the cargo containers' presence in Multnomah County are similar to those in the California counties, these two cases clearly indicate that the cargo containers are subject to the ad valorem tax.

The taxpayers also contend that their cargo containers are exempt from ad valorem taxation under the Oregon free port law. However, ORS 307.810 grants an exemption only for

> "Personal property in transit through this state [that] is goods, wares and merchandise destined for sale in the ordinary course of trade or business. . . ."

The cargo containers are used to transport personal property destined for sale in the ordinary course of the trade or business, but are not, themselves, destined for sale out of state. The Oregon free-port law was not intended to extend to containers used and reused transporting goods.

The two enclosed California decisions clearly hold that cargo containers used in interstate and foreign commerce are not immune under the United States Constitution from an apportioned ad valorem tax. In addition, the Oregon free port law does not extend its exemption protection to the containers. Consequently, the continuous presence of cargo containers in Multnomah County subjects them to an apportioned ad valorem tax.

Sincerely,

/s/ JAMES D. MANARY
James D. Manary
Assistant Attorney General

bem

cc: Walt Taylor
Personal Property Assessment

RECEIVED
MULTNOMAH COUNTY
FEB 02 1978
BRUCE G. LAWMAN
DIRECTOR, DIVISION OF
ASSESSMENT & TAXATION

Exhibit R

[Letterhead of the United States Department of State]

17 April 1978

Dear Governor Brown:

I am writing to express support for SS 1756, introduced by Senator Dills, to exempt foreign cargo containers principally used in the transportation of cargo by vessels in ocean commerce, from property taxation for the fiscal year 1979-80 and fiscal years thereafter. The Department of State is pleased to learn of the introduction of this bill and strongly recommends its passage.

Enactment of this bill would extend indefinitely the present exemption of such containers from property taxation. In response to past imposition of local property taxes upon such containers, foreign governments have expressed their concerns that containers owned by their citizens may be subjected to double taxation, i.e., taxation both in the home country and in California. For example, the Department recently received an aide-memoire from the Government of Japan complaining that local California property taxes upon foreign containers used in foreign commerce constitute a tax burden which impedes the smooth development of U.S.-Japan trade relations. Enactment of SB 1756 would preclude any renewal of such concerns on the part of foreign governments.

The proposed legislation would also lessen the likelihood of retaliatory taxation measures against U.S. citizens engaged in ocean commerce abroad by foreign governments which do not currently impose a property tax upon U.S. containers.

We believe the proposed legislation will foster the financial health and well-being of both U.S. and foreign vessels now operating to California. The legislation appears consistent with the principle of taxation based upon reciprocity. We hope it will receive early and favorable consideration.

Sincerely,

/s/ Julius L. Katz
Julius L. Katz
Assistant Secretary for
Economic and Business Affairs

cc: Senator Dills
Senator Marks
Senator Beverly
Senator Nejedly
Senator Rodda
Senator Stull

Assemblyman Cullen
Assemblyman Bane
Assemblyman Bannai
Assemblyman Boatwright
Assemblyman Chel
Assemblyman Imbrecht
Assemblyman Knox
Assemblyman Vincent Thomas

The Honorable
Jerry Brown,
Governor of California,
Sacramento.

Exhibit S

521st Council meeting

— Transport —

Luxembourg, 12 June 1978

President: Mr. Kjeld OLESEN

Minister for Public Works
of the Kingdom of Denmark

ACTIVITIES OF CERTAIN NON-MEMBER COUNTRIES IN THE FIELD OF MARITIME TRADE

In the light of difficulties observed as a result of the activity of certain third countries in the field of maritime trade the Council examined measures to be taken by the Community to counteract this trend. It recorded its agreement on a framework decision binding each Member State to take steps to set up a system by which to gather information on the activities of the fleets of countries whose practices are detrimental to the maritime interests of Member States, in particular insofar as these activities undermine the competitivity of Member States' fleets engaged in international maritime trade.

To attain these goals each Member State must be able to obtain information on the level of services offered, the nature, volume, value, origin and destination of goods loaded and unloaded and on the rates charged for these services.

The Council will decide on the countries to whose fleets the all-round Community system of information will apply.

On this point the Council instructed the Permanent Representatives Committee to work out in conjunction with the Commission measures for implementing these provisions,

for adoption by the Council at its next transport meeting in November, bearing in mind the wishes expressed by delegations as regards the activities of State-trading countries and flag of convenience countries.

On the basis of the information gathered, the Council will be able to decide suitable counter measures against offending countries. These will form part of national legislation, be applied in concert, and might include restrictions, depending on the circumstances.

One delegation gave its agreement subject to confirmation, and will make known its firm position at the earliest opportunity.

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,
Appellants,

vs.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,
Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF FOR THE APPELLEES.

JOHN H. LARSON,
County Counsel,
JAMES DEXTER CLARK,
Deputy County Counsel,
648 Hall of Administration,
Los Angeles, Calif. 90012,
(213) 974-1833,
Counsel for Appellees.

Staff Assistants:
MARY MAYER,
GREASON HAWORTH,
LAWRENCE S. RUBINSON,
LINDA VAN WINKLE.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Miscellaneous

Regulations

Statutes

Textbooks

IN THE

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Appellants,

vs.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF FOR THE APPELLEES.

The Question of Jurisdiction.

The Appellants and the United States have placed the Appellees in an awkward position. The Appellees firmly believe that a nondiscriminatory fairly apportioned ad valorem tax on this property, like all other property in the taxing jurisdiction, is valid, and that the Appellants are not in a privileged position because they use containers rather than conventional means or because they have their corporate offices in another country. At the same time the Appellants have injected the issue of the relationship between the tax and governmental services, and the United States depends for all

of its arguments on the Container Convention (20 UST 301). Neither of these matters were brought before California's Appellate Courts. In support of these matters both the Appellants and the United States seek to introduce new "facts".

The Appellees have dealt with the theories and the "facts" presented as they reflect upon the merits of this case. They believe that both the Appellants and the United States are presenting factual and legal conclusions which are incorrect.

This Court has held that considering issues in this manner is incorrect and that new facts are improperly brought up at this time (*Beck v. Washington*, 369 U.S. 541 (1962); *Cardinale v. Louisiana*, 394 U.S. 437 (1969)). The Appellants' response to such arguments is simply to present more facts.

The Appellees urge this Court to dismiss the Appeal.

The details of the factual and legal assumptions made by the Appellants and their supporting *amici curiae* are set forth in sections of this brief dealing with the Appellants' Assumptions and the Facts.

Summary of Argument.

The Appellants and their supporting *amici curiae* have assumed that a property tax is both a regulation and a user fee. They have also assumed that the federal government has authority to change a nondiscriminatory state tax into a federal regulation by giving an exemption solely on the basis of the origin of the property. They believe that public health, flood control and school functions have nothing to do with their ability to bring their property into the taxing jurisdiction and to safely use it there to make a profit.

They believe that their ability to so use their property has nothing to do with its value. Factually, the Appellants assume that part of a budget is all of it and that city budgets are not to be considered at all. All of these assumptions are utilized to support a panoply of constitutional positions, but all of them are incorrect.

As to the arguments concerning both interstate and foreign commerce: (1) The Tonnage Clause does not prohibit an ad valorem property tax (*State Tonnage Cases*, 79 U.S. 204 (1871)); (2) A fee test is not applicable to ad valorem property taxes (*Illinois Central R.R. Co. v. Decatur*, 147 U.S. 190 (1893)), even if used to test a privilege tax. Even if it were, the general services of the localities provide a healthy, educated workforce on which the Appellants rely in doing business. Without those services, the Appellants would have to provide more training (or indirectly pay for more training conducted by the companies moving its containers), health activities, fire protection and road construction. Even though the localities' benefits to the Appellants may not all be of a "direct" variety, they nevertheless increase their ability to move their containers and reduce their costs. They are, therefore, subject to a general tax in proportion to value (*The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus*, 154 U.S. 439, 445-6 (1894)); (3) The due process clause does not prohibit a tax if nondiscriminatory and related to the taxpayer's activity in the state (*Moorman Manufacturing Co. v. Bair*, ... U.S. ...., 98 S.Ct. 2340 (1978).

As to the preference over United States' nationals sought by the Appellants specifically because of their foreign home office:

(1) The general rule is that carriers in both interstate and foreign commerce are subject to property taxes (*Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 23 (1891); *Maine v. Grand Trunk Ry. Co. of Canada*, 142 U.S. 217 (1891)).

(2) The Appellants and their supporting *amici curiae* use cases involving no continuous presence of property as if specifically exempting property in foreign commerce. They further rely on the idea that federal regulation, specifically the tariff system, cannot work unless the states lay no general taxes which increase the cost of foreign goods. Such logic has been rejected by this Court (*Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); *Department of Revenue v. Assoc. of Washington Stevedoring Cos.*, ... U.S. ...., 98 S.Ct. 1388 (1978)). They also assume that the federal government has the right to carve out exemptions in state taxes in order to make its regulations. But it has long been held that the federal government may not prohibit nonregulatory state taxation which is constitutionally valid (Fed. Papers No. 32; *Lane Co. v. Oregon*, 74 U.S. 71, 76-78 (1869); *Gibbons v. Ogden*, 22 U.S. 1, 199-200 (1824); *Union Pacific v. Peniston*, 85 U.S. 5, 30 (1873); *Low v. Austin*, 80 U.S. 29, 34-35 (1872)).

(3) Contrary to Appellants' contention there is no "custom of international law" requiring the use of a home port concept which will allow a port to tax property even though it may never come within its jurisdiction. (See *Southern Pacific v. Kentucky*, 222 U.S. 63 (1911).) Thus, the Appellants argue that a taxing jurisdiction must give benefits in order to tax but seek to prohibit the method most likely to being that result to pass. They argue that it is well

settled that foreigners have preference over nationals, but cite no authority. International law experts have called such thinking an "insult" to nationals of a country (Roth, "International Law Applied to Aliens" (1949) pp. 62-65).

(4) Treaties themselves cannot expand federal power (*Holden v. Joy*, 84 U.S. 211, 242-3 (1872); *Holmes v. Jennison*, 39 U.S. 540, 569 (1840)). The fact that the Customs Bureau does not impose duties on the containers does not sanctify them, nor was it ever intended to do so. *McGoldrick v. Gulf Oil Co.*, 309 U.S. 414 (1940) never considered the power of the federal government in this area and dealt with a different test (even before *Youngstown Sheet & Tube Co. v. Bowers*, ... U.S. .... (1959)) of immunity from state taxation. *Michelin v. Wages, supra*, makes that test no longer appropriate. None of the treaties or international agreements provide aid to the Appellants and most prescribe "national treatment" as proper in the area of state and local taxation.

As to the Appellants' threat of "double taxation": It is no less because of the use of the "home port" doctrine. Many countries will continue to tax containers within their borders over 30 days or more. The only difference between the two alternatives offered this Court is that the apportionment method (used for other taxes) will achieve a relationship to the governmental benefits and will treat all businesses which are active in this country in the same way.

ARGUMENT.

PRELIMINARY CONSIDERATIONS.

This case involves the taxability of cargo shipping containers which are located in the taxing jurisdiction and which the Appellants use to carry goods to and from foreign countries.

The general rule in this country is, that although other taxes may not be validly imposed by the states:

> "We may here repeat, what we have so often said before, that this exemption [from a full license tax] of interstate and foreign commerce from state regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State as the property of other citizens is taxed . . . ." (*Leloup v. Port of Mobile,* 127 U.S. 640 at pp. 648-649 (1888).)

The tax in this case is one imposed on all property located within the State of California (Cal. Const. Art. XIII, Sec. 1).

The Appellants urge several grounds for its non-applicability to them.

A. The Appellants' Basic Assumptions.

All of the Appellants' arguments (as well as those of the United States in contending that its departments may convert a nondiscriminatory state tax into a federal regulation), are based upon certain factual and legal assumptions. Those assumptions have no support in law or logic.

The factual assumptions are dealt with in the section of this brief dealing with the facts on the record as well as those which are not.

The Appellants' first assumption is that the provision of general services by the States in order to assure economic and social stability does not benefit carriers doing business therein. Therefore, conclude the Appellants, the property tax on cargo containers is not valid under a variety of legal principles. The assumption is unwarranted. Schools educate the Appellants' repairmen, as well as the operators of the cranes, trucks, and trains (and the police and fire forces) upon which they rely in moving their containers. They are trained in basic mechanical and communications skills by the state and the districts; they are kept free from disruptive epidemic by the public health efforts of local and state government; flood control districts prevent potential disaster to the containers and the routes they travel; water is supplied to industrial areas, including the Appellants', both for the workers and the machinery that repairs and moves the containers. It is true that some of these activities benefit the workers and the companies rendering services to the Appellants. But the Appellants share in the benefits as well. A worker may directly benefit from the fact that the mosquito abatement district has prevented a malaria epidemic. But the Appellants may well depend upon that worker's presence to move or repair its containers. All of the services supported by a general tax benefit the ability of the Appellants to enter California and make money there. That is why general taxes, even those imposed upon nonresidents, have not been tested by measuring how specific that benefit is. (See *Illinois Central R.R. Co. v. Decatur,* 147 U.S. 190 (1893); *Thomas v. Gay,* 169 U.S. 264 (1897)).

The Appellants' second assumption is that a general tax is the same as a privilege tax or a user fee.

The Appellants first assert that *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977) provides the tests for any tax. It next asserts that the "reasonable relationship between tax and benefit" test must be applied to a tax as if to a user fee. But the property tax is not a user fee, and has not been tested against a "fee" rationale. The regular and constant presence of the property in the taxing jurisdiction, unchanging and increasing as it is, provides assurance that the services of state and local governments (limited as they are to benefiting the public at large: *Citizens Savings & Loan v. Topeka,* 87 U.S. 655 (1873)) will aid the owner in doing business, whether the business is foreign or domestic (*Pullman's Palace Car Co. v. Pennsylvania, supra* at p. 26).

The third assumption is that a tax is the same thing as a regulation. Numerous cases are cited as prohibiting the States from regulating. But they are not applicable unless the tax is imposed unevenly or on property not located in the jurisdiction (*Michelin Tire Corp. v. Wages, supra* at p. 286).

> "There is no analogy, then, between the power of taxation and the power of regulating commerce." (*Gibbons v. Ogden,* 22 U.S. 1 (1824) at pp. 199-200).

The fourth assumption is that the federal government in general and a federal executive department in particular, may convert a nondiscriminatory state tax into a discriminatory regulation, benefiting one class of business simply because it has its principal place of business

in another country. This assumption is grounded upon the Appellants' and the United States' view that the federal government can prohibit and regulate any state tax, even those which are nondiscriminatory revenue measures. This assumption is simply not correct (*Union Pacific v. Peniston,* 85 U.S. 5 (1873) at p. 30; *Lane Co. v. Oregon,* 74 U.S. 71 (1869) at pp. 76-78; *Low v. Austin,* 80 U.S. 29 (1872) at pp. 34-35; Fed. Papers No. 32) (see Clark, *Property Taxation of Foreign Goods and Enterprises,* 4 Pepperdine Law Review 39).

Although the issue was taken up at a time when the home port doctrine was the rule of situs, this Court explicitly stated

> "that the right of the States to tax was not impaired by any affirmative grant of power to the General Government . . . ." (*The Wheeling, Parkersberg & Cincinnati Transportation Co. v. Wheeling,* 99 U.S. 273 at p. 280).

Finally, the Appellants assume that State and local services are in no way related to the value of the property and object to the decreasing amount of taxed value as the containers age. But the value of the containers is their value to generate income. To the extent that the containers fail to generate income they become valueless to the Appellants, or any similar enterprise. This is borne out by the fact that insurance policies on property compensate the owner for loss in terms of the value of the property lost. If a flood causes the loss of a container, it will fail to generate

income. Of course, the older the container is, the shorter economic life it has and the less future income it will generate. Its value, logically, is lower, and its loss through fire or flood will be less serious as its age approaches the normal time for its replacement.[1] The benefits to the taxpayer are, thus, related to the value of the property to him.

THE FACTS.

A. The Facts Which Are on the Record.

Both the Appellants and the Appellees agreed to a statement of the facts. They agreed that that statement should be utilized by the appellate courts in their review of this case. That statement is now part of the record (App. pp. 27, *et seq.*). The facts as agreed by all of the parties show that a uniform number of cargo shipping containers is utilized by the Appellants in the taxing jurisdiction throughout the year (App. p. 33). It also shows that the individual containers were in the jurisdiction an average of three weeks, but always less than six months, and were in transit except for the time awaiting loading and awaiting repairs in the taxing jurisdiction (App. p. 31). The cargo shipping containers may be used on ships, trains, or trucks in order to transport cargo (App. pp. 31-32). A general outline of the movement of the containers when they leave the harbor area by means of truck or rail is set forth (App. pp. 31-32). Although it is not specified whether the containers were taxed in Japan on an apportioned basis or full basis, they were taxed there, while American containers were not (App. p. 32).[2]

[1]Appellants had an opportunity to contest the value placed upon the property by filing for value reduction before the local Assessment Appeals Board, but their complaint shows only that they brought this action to contest the purely legal questions (App. pp. 3-20).

B. The Facts Which Are Not on the Record.

The Appellants have attempted to introduce more "facts" in an effort to defeat the tax. These "facts" were not addressed at *any* time before the Jurisdictional Statement. Other "facts" were not referred to until the Appellants' Brief.[3]

The Appellants contend that the combined expenditures for some police and fire protection and roads ($196,255,471.00 for 1972-73) are not enough, because personal property taxes amounted to $98,248,-582.00. This reasoning is supported by some calculations which have no meaning. They are further described in the Appellees' Motion to Dismiss or Affirm.[4]

In an effort to provide more information, they recite a paragraph of facts in their brief which facts are simply unsupported (see p. 8, par. 3). They assert, first, that the Port of Long Beach maintains a security

[2]The "Guide to Japanese Taxes 1975-1976" (by Taizo, Hayashi, published by Zaikei Shoho Sha (Tokyo)) does not state that personal property taxes are imposed, even though it refers to real property taxes. Apparently, Japan has discontinued the practice of taxing its own containers on any basis. The Multi-State Tax Commission's brief takes up this question.

[3]The Appellants had ample opportunity to open up new areas. In fact, the California Court of Appeals accepted a totally new argument at oral argument, and the present attorneys brought up other new facts in their Petition for Rehearing to the California Supreme Court.

[4]The Appellants had an opportunity to respond, both in their Reply to the Motion and in their Brief. They have not done so.

force and some fireboats.[5] Next, they introduce a financial statement for years not covered by these taxes for the Port of Los Angeles (A.B. pp. 12a-13a). The financial statement shows no expenditures for fire or police protection, but do show, the Appellants point out, that for those years the Port of Los Angeles was operating at a profit. They do update this material by showing essentially the same thing for the first year covered by the taxes in question (A.B. p. 14a).[6] Finally, the Appellants point out that with regard to one of the bills for one of the years in question, taxes were levied by the City of Los Angeles, the County, the school districts of the area, flood control district, water replenishment district and agencies, and the mosquito abatement districts (A.B. p. 11a).

From the "evidence," the Appellants assume, (1) that only direct fire and police protection (*i.e.*, not including buildings, central administration, etc.) are fairly related to the tax; (2) that no services are provided by the City of Los Angeles or the City of Long Beach; (3) that no state funds are used to support those services; and (4) that the County spends 2% of its budget on services related to property.

The conclusions are not even justifiable from the "facts," and the "facts" are incomplete and unsupported.[7]

---

[5]Both City Appellees provide police and fire protection to all land areas of the harbors, as well as to all the territory in their jurisdictions.

[6]The lien date (as Appellants point out) falls in the March before the actual tax year in question.

[7]The Appellants invite this Court to remand this matter if the court finds it cannot take cognizance of the facts (see p. 42 fn. 10 of Appellants' brief). A remand of this matter

Perhaps the appellants' first "assumption," *i.e.*, that only police, fire, and roads relate to property, is the most unsupported and illogical. The assumption would mean, for instance, that, even though malaria prevention provides a healthier work force with less disruption of commercial traffic, the prevention of malaria does not help the property which Appellants use to make a profit. The schools provide employees who are educated and skilled in operating the heavy equipment which removes the containers from the ships, thus eliminating the need for more expensive manual labor.[8] Other skilled personnel repair the Appellants' containers and still others drive the trucks and trains which carry the containers to their destination, both in and out of the taxing jurisdiction.[9] None of these concepts are dealt with by the Appellants. They simply ask this Court to assume that there is *no* relationship between public health or public education and the enterprise being operated by them.

---

is totally unjustified. The Appellants have had a substantial amount of time to apprise the courts of facts which are more favorable than those stipulated. They have not even shown city expenditures, tax bills for all Appellants, or a complete picture of the County's expenditures. Many of these defects were pointed out to the Appellants in the Motion to Dismiss or Affirm. That they have not responded indicates their willingness to proceed on the basis of the record before the Court.

[8]It should be noted that public schools and technical junior colleges are geared toward increasing mechanical skills as well as communication skills. Both are required on jobs such as those affecting Appellants' containers.

[9]The Appellants claimed that the containers were (never unloaded) in the taxing jurisdiction in their Reply to Motion to Dismiss or Affirm. But the Agreed Statement indicates that they were stopped for loading and unloading, and that the average time in the jurisdiction is three weeks (App. p. 31).

C. Conclusion.

The Appellants have referred to facts which are not on the record, have assumed additional facts, and made totally unwarranted conclusions.[10]

The Appellants' efforts to overcome the Agreed Statement they signed lie at the foundation of many of their arguments throughout their brief. Throughout they fail to realize the logical connection between services which have been rendered by the state and their property's continued safety and usefulness. Thus, the usual test of "benefits and protections"[11] cannot by mere fiat, be restricted to only some "protections".

The claims of the Appellants break themselves down into those which apply equally to interstate and foreign commerce, and those which apply because of an assumed preference in favor of foreign owners or commerce. The new material and issues apply to their arguments concerning both interstate and foreign commerce. The effect of these new submissions on the jurisdictional question has already been discussed.

As to the merits, the "interstate foreign commerce" questions arise from (1) the Appellants' assumption that their property does not benefit from local schools, flood control, landward police and fire protection, local roads, public health and the like, and (2) the Appellants' assumption that the property tax should be subject to the same tests as a user fee. These two assumptions have been discussed previously. It remains to determine the impact of those assumptions on the proper interpretation of the Constitutional provisions relied upon by the Appellants.

---

[10]The Appellees offered to disprove or rebut the Appellants' facts in their Motion to Dismiss or Affirm.

[11]*Wisconsin v. J. C. Penney*, 311 U.S. 435 (1940) at p. 444.

PART ONE.
THE ARGUMENTS AFFECTING COMMERCE GENERALLY.

I.
THE TONNAGE CLAUSE DOES NOT PROHIBIT AD VALOREM TAXES.

The Tonnage Clause, of course, applies whether the vessel taxed is foreign or from the United States. The Appellants assert that a tonnage duty is any *tax* not bearing a relationship to a *specific* benefit and that since the property tax is a general tax (relating to many benefits), it is prohibited (A.B. pp. 35-37). Of course, the logic of this would be to exclude any general tax on any instrumentality by water, even by the state of domicile. The home port doctrine so earnestly advocated by the Appellants would simply become a "no-port" doctrine.

The complete answer to the Appellants' contention is that *The State Tonnage Case,* 79 U.S. 204 (1871) specifically distinguishes a general ad valorem property tax from the tonnage duty concept (79 U.S. at p. 213). The Appellants rely on cases prohibiting fees and charges not having the specific relationship with the specific service. In those cases general taxes used to support government's provision of economic and social stability are not considered.

II.
THE COMMERCE CLAUSE DOES NOT PROHIBIT AD VALOREM TAXES.

The Appellants and their supporting *amici curiae* argue that foreign-owned property ought not to be taxed while domestic property is. This distinction will be taken up later. But the Appellants also assert that

the Commerce Clause prohibits the tax in question because of reasons applying equally to interstate and foreign commerce. They do this in the face of cases uniformly holding, for the last century, that as long as the apportionment is adequate, a State is not prohibited by the Commerce Clause from levying a nondiscriminatory ad valorem property tax on property used in interstate commerce.[12]

A. The Rational Relationship Test Does Not Prohibit General Taxes.

The Appellants rely on *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977); *Ingels v. Morf,* 300 U.S. 290 (1936); *Commonwealth of Massachusetts v. United States,* .... U.S. .... (98 S.Ct. 1153) (1978); *Interstate Transit, Inc. v. Lindsey,* 283 U.S. 183 (1931); and *Sprout v. South Bend,* 277 U.S. 163 (1928) for the proposition that the tax in the case at bar must be related to only fire and police protection, and for the idea that a value-related tax is contrary to the commerce clause. With the exception of *Complete Auto Transit,* the Appellants rely on cases involving *fees.* The general rule regarding taxes is not abrogated by the fee cases since they deal with a charge, which all acknowledge is for a specific purpose and which is imposed upon the user whether he comes into the State for two days or two years.

In that way the privilege tax upheld in *Complete Auto Transit* is similar to the fee. It may be imposed regardless of the duration or amount of the activity

[12]The Appellants argue that certain administrative regulations have the effect of rendering the property "not present" in the United States. These regulations are taken up in connection with the due process clause and the assumption that foreign enterprises are to have preference over domestic ones.

being taxed. Although in that case the privilege tax was measured by gross receipts (also see *Dept. of Revenue v. Association of Washington Stevedoring Companies, supra*), the tax was imposed on a privilege and might just as well have been a flat fee. It is no wonder that the court reviewed the relationship between the privilege tax and the benefits conferred.

The property tax, based upon the value of property continuously or regularly in the jurisdiction and apportioned so as not to fall on a use outside the jurisdiction, rests on an entirely different basis. It is not imposed, and cannot be imposed on property having only a temporary presence. The continuity of the presence and its duration must be substantial, creating by themselves the assurance that the property is receiving benefits of a more general sort than those reimbursed by fee. The taxing of the property itself on the basis of its presence provides assurance that the owner (or user) is receiving benefits from the jurisdiction. Restricting the tax to that allocable to the actual presence in the jurisdiction assures that the State imposes the tax on the basis of property benefiting from its services. (See *Illinois Cent. R.R. Co. v. Decatur, supra.*) That is why a piecemeal investigation of the benefits and the payment is not required when general taxes such as this are levied (see *Illinois Cent., supra; Kelly v. Pittsburgh,* 104 U.S. 78 (1881)).

The privilege tax requires the reasonable relationship investigation for the further reason that its basis is the privilege of doing business in the State. Without some assurance that the taxpayer is, indeed, relying on the State's services (as concluded by the Mississippi Supreme Court in *Complete Auto,* 430 U.S. 277),

the privilege tax runs the danger of being a fee on the basis of no state activity whatsoever. The apportioned tax on property having a continuous presence in the jurisdiction does not run this risk because that presence is sufficient to insure that the State's provision of physical, economic and social stability will benefit the property so taxed. Thus, the State runs no danger of imposing a levy on the mere fact that an enterprise is interstate in character and, in turn, taxing a privilege granted by Congress. The prevention of such a charge is, of course, the very reason for the negative impact of the Commerce Clause (See *Leloup v. Port of Mobile, supra*). Of course, if the "privilege" tax is geared toward other in-state factors, it does not have that effect (*Complete Auto Transit v. Brady, supra*).

B. The Complete Auto Transit Test Validates This Tax.

Despite the argument made above, it may be appropriate to consider the effect which the reasonable relationship test would have on such a general tax as this (see *Clark, supra*). The Appellants have produced a tax bill for one company for one of the three years involved in this action. They rely on this bill for the proposition that they pay for education, flood control, water supply, mosquito abatement, and County and City services generally. They engage in the assumption, already pointed out, that none of these services has anything to do with them or their property. They go further and claim, apparently, that because the tax does not go entirely to fire and police protection, it is contrary to the Commerce Clause. Of course, if one is to engage in the reasonable relationship test, one must review the services provided. The support

which all of the services in question provide to the Appellants' property has been pointed out. To allow the State to tax only for those purposes approved of by the Appellants is to simply ignore the universally held rule that government may render services whether all of the recipients want them or not. (See *Kelly v. Pittsburgh, supra.*)

From the arguments pressed upon this Court by the Appellants and their supporting *amici*, one would conclude that a user fee imposed upon them for fire protection would not meet any objection. The fee, of course, would be valid under the test provided in *Massachusetts v. United States, supra,* at p. 1165, unless the total amount collected greatly exceeded expenditures. One would also believe that expenditures for supporting such items as capital improvements, vehicle maintenance, and purchasing, would not be improper.[13] Although the Appellants appear to assume the contrary, a fee for flood control services would also be supported by a benefit to them. The Los Angeles basin is subject to substantial flood dangers.[14] Such dangers pose a threat to the very routes which the containers travel as well as the harbor area to which the waters are guided during heavy storms. It is difficult to conceive of any reason why such a

[13]The Appellants appear to deny the ability of such a fee to support any part of the service not directly benefiting them. But it cannot be doubted that without long-range and support expenditures, the quality of the "direct" portion of the service will deteriorate. Without public health, for instance, the police force will be less able to protect the Appellants' property.

[14]See Bigger, "Flood Control in Metropolitan Los Angeles, Berkeley, Univ. of California Press, 1959 (Lib. Cong. No. A59-9465) pp. 1-10, 110-111.

state of affairs would not support some levy. The other services provided show the same sort of support, both direct and indirect.

Of course, attempting to levy a fee for each of the services provided by local government would vastly increase the already large bureaucratic army while not assuring any increase in the service rendered. For that reason it is logical to support the imposition of general levies on persons and property having a continuous existence in the jurisdiction. The amount of actual benefit derived from one service may be greater or less depending upon the use to which the property is put, but the benefit, although indirect in some instances, is nevertheless present (See *Kelly v. Pittsburgh, supra,* at pp. 81-82).

Movable property is no less benefited than real property; this is especially true where, as in this case, the property is utilized in a profit-making enterprise. In fact, the frequent movement generates more dependency on a fuller variety of services than the property would if it were stationary. This includes, of course, highways to which the Appellants do not contribute by means of the in lieu motor vehicle registration (See Cal. Revenue and Taxation Code §10758).[15]

[15]The Appellants argue in essence that their contribution to highways is made through the carrier who operates a tractor with a chassis without the trailer into which goods can be placed. The fee levied upon the tractor and the chassis, the Appellants urge, is sufficient. That argument ignores the fact that the motor vehicle fee is in lieu of property taxes and that it is imposed on the basis of 2% of value (Cal. Rev. & Tax. Code §10752.1). The carrier does not have to pay the portion of the fee represented by the trailer's value, because the trailer in this case is the cargo van. Thus, the Appellants appear to be arguing that they are entitled to a total exemption from supporting road costs to the extent of the differences between a truck with a trailer and one without. (Assuming the cargo shipping container is roughly the equivalent of that difference in value, the Appellants are asserting that the 3.4% tax on them is void while at the same time enjoying an exemption from a 2% road tax. As a result of Proposition 13 (Cal. Const. Art. XIII A), the tax on cargo containers, like all property, will be 1% of market value, reducing this property tax to ½ the motor vehicle fee rate.

That movement actually increases reliance upon a skilled workforce to safely take these containers from one place to another and to repair the damage that does occur.[16]

C. Ad Valorem Taxes to Support Local Services Are Logically Related to the Appellants' Property.

Finally, the Appellants urge that they are not benefited in relationship to value. This assumption has been partially addressed. The schools and public health functions of the localities help maintain a skilled workforce. That workforce moves the containers from ship to shore and while on shore, moves them throughout the jurisdiction, repairs them, and directly supports the importers which deal in the goods they carry. The value of the containers to the Appellants is the amount of income they are capable of generating. The localities provide support necessary to utilize the containers safely and efficiently. Unemployment supports the retention of the workforce in the area in difficult times. To the extent that the workforce (or the fire or police force) is less skilled in both communication and mechanical skills, the value will be reduced because the Appellants' cost of moving the containers will increase. If the Appellants chose to do business in a country or a region without such a workforce they would be obliged to give their workers there

[16]The Appellants have repair facilities in the taxing jurisdiction (App. p. 31). At least one of them has a business office in California (see ....).

more training or to import their own workforce. Since the localities undertake these efforts, the income-generating value of the containers is maintained. (See generally *The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus,* 154 U.S. 439, 445, 446 (1894).)

III.
THE DUE PROCESS CLAUSE DOES NOT PROHIBIT AN AD VALOREM TAX ON AN APPORTIONED BASIS.

The Appellants attempt to relitigate *Pullman's Palace Car Co. v. Pennsylvania, supra,* asserting that a federal customs regulation and a California tax regulation stand for the proposition that the property, although present throughout the tax year was, in fact, not "legally" present. They further argue that due process requires a reasonable relationship between the tax and the extent of activity in the jurisdiction (A.B. pp. 48-49). They then assume that this means that the connection be between the tax and the *government's* activity supporting the taxpayer.

The situs requirement in connection with the due process clause is discussed in *Pullman's Palace Car Co. v. Pennsylvania, supra,* at p. 27; *Ott v. Mississippi Barge Lines,* 336 U.S. 169 (1949) at p. 174; *Western Union Telegraph Co. v. Massachusetts,* 125 U.S. 530 (1888) and *Marye v. Baltimore & Ohio R. Co.,* 127 U.S. 117, 123-124 (1888) and needs no further discussion here. But the Appellants maintain that there is an exception to the due process rules discussed there when a state or federal regulatory agency has determined that no situs exists.

Of course, the regulations relied upon by the Appellants show no such thing. The California Supreme Court has construed 18 Cal. Adm. Code Section 205 so as to include the presence of rotated property (*Sea-Land Services Inc. v. County of Alameda,* 12 Cal. 3d 772, at pp. 777-778, 117 Cal. Rptr. 448, 528 P. 2d 56 (1974)) and that interpretation is binding for the purposes of the Court's review (*Saltonstall v. Saltonstall,* 276 U.S. 260, 270 (1928)). Even if it were not binding, only the California Legislature has the authority under California law to make exemptions from the general rule of the taxability of personal property in the state (Cal. Const. Article XIII, Section 2) so that the Appellants' effort to create an exemption on the basis of the administrative regulation is improper.

Equally misplaced is the Appellants' reliance upon 19 CFR Section 10.41a(a)(1). The Appellants assume that the "release (into the country) without entry . . ." means that the vans are simply not present. Of course, "entry" in customs usage means compliance with customs regulations such as submitting the proper documents to the customs office and not physical entry in the borders of the United States (*Harrison v. Vose,* 50 U.S. 312 (1850); 19 CFR Sec. 141.68). It would be peculiar indeed if the validity under the due process clause should depend upon whether the Customs Bureau requires certain formalities to be completed or not. If 19 CFR 10.41a(a)(1) is claimed by the Appellants to be a declaration by the Customs Bureau of whether an article is physically in the country or not, its

effect is covered by discussion of the foreign preference assumption, *infra*.[17]

The Appellants further assert that since the localities impose a harbor fee and motor vehicle registration, they cannot, as a matter of due process, impose a general levy to support other services. Again, they rely on the assumption that their property does not benefit from those services. Of course, *Pullman's Palace Car Co. v. Pennsylvania, supra,* and *Ott v. Mississippi Barge Lines, supra,* both reject this reasoning. Even if *Wisconsin v. J. C. Penney, supra,* did require some due process benefit analysis, it could not possibly stand for the proposition that a tax made in addition to other levies is per se unconstitutional because such an additional tax was validated by that case. In addition, the Court specifically stated that,

> "Had Wisconsin, as part of its price for the privileges it afforded foreign corporations within its borders, explicitly provided for a supplementary tax on the Wisconsin earnings of such corporations, ... The power of Wisconsin to do so would hardly be questioned." (311 U.S. at pp. 442-443.)

Both *Wisconsin v. J. C. Penney, supra,* and *General Motors Corp. v. District of Columbia,* 380 U.S. 553 (1965), are relied upon by Appellants as requiring some piecemeal investigation of the tax and the benefits over and above that required of general taxes under

[17]One other novel argument raised by Appellants is that Cal. Const. Art XIII, Sec. 4 of 1932 exempts their property because the containers are simply part of the ships exempted. The multiplicity of uses of the containers hardly puts them on the same footing as ship's equipment. In any case, the Constitution exempted vessels registered in-the-state, not out-of-state vessels, as the Appellants claim.

the Commerce Clause. But the Court has not utilized the due process clause in this way (*Moorman Manufacturing Co. v. Bair,* .... U.S. ...., 98 S.Ct. 2340 (1978) at page 2359).

The due process clause requires the specificity of benefits normally required of a general tax and achieves that end by requiring proper apportionment. It requires that the tax be tailored to the extent of the activity in the state so that there is assurance that the taxpayer is receiving, in return, the opportunities, protections and the benefits of "an orderly, civilized society." (*Wisconsin v. J. C. Penney, supra,* at p. 444). A property tax apportioned to the amount of presence continuously or regularly in the State achieves those ends (*Ott v. Mississippi Barge Lines, supra,* at p. 174).

PART TWO.
THE FOREIGN-DOMESTIC DICHOTOMY.

I.
INTRODUCTION.

A. The Appellants' Contentions.

The general rules regarding the tests applicable to taxes affecting interstate and foreign commerce have been set forth. The general rule regarding the application of these tests to foreign commerce and interstate commerce alike has been stated by this Court:

> "It is equally well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction." (*Pullman's Palace Car Co. v. Penna., supra,* at p. 23.) (See also *Sea-Land Services Inc. v. County of Alameda, supra,* at pp. 781-784).

In keeping with this rule, property of foreign corporations doing interstate business has been held taxable (*Maine v. Grand Trunk Ry. Co. of Canada,* 142 U.S. 217 (1891), where the tax was on gross receipts in place of all other taxes, and apportioned); and a tax on income of a foreign corporation doing international business, apportioned on the basis of, *inter alia,* personal property (while its personal property was exempted) was also upheld (*Bass, Ratcliff & Gretton, Ltd. v. Tax Comm.,* 266 U.S. 271 (1924)). Finally a tax on a United States business transporting goods in foreign commerce has been upheld (*Dept. of Revenue v. Association of Washington Stevedoring Cos., supra*) (see also *Western Union Tel. Co. v. Taggart,* 163 U.S. 1 (1896)).

Nevertheless, the Appellants seek to avoid the general rule because they are foreign companies whose business in this country is transporting goods in foreign commerce. They do this even though an income tax may be imposed upon them and even though they are accorded treatment on an equal basis with United States residents (Treaty between Japan & the United States to Prevent Double Taxation 23 U.S.T. 1775, Arts. VII, VIII (5)).

The Appellants suggest a variety of reasons to support their claim that they should receive better treatment than their countrymen doing other sorts of business (or doing it without containers) and better treatment than United States businesses.

The Appellants and their supporting amici curiae suggest that a nondiscriminatory tax[18] should instead be altered so as to become a regulation favoring foreign enterprises or commerce. Although they make this contention on the basis of several constitutional, treaty, and administrative provisions, the avenues they pursue can be broken down into three principal arguments.

First, the Appellants and amici contend, foreign commerce is constitutionally not subject to any general taxes by the states because the federal government has a keen interest in its regulation. This approach is nothing more than applying *Freeman v. Hewit,* 329 U.S. 249 (1946) to foreign commerce. They state that *Washington Stevedoring* involves a company whose activities are carried on in only one State and thereby is not eligible for their broad exemption.

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[18]The "all government" approach to discrimination will be taken up in connection with the commerce clause discussion, *infra.*

Second, there exists a "custom of international law" which is so pervasive that it overcomes the usual requirement for national treatment or equality. That international rule is imposed upon the nations of the world as a result of its being

> ". . . in accordance with a constant and uniform usage. . . ." (*Columbia v. Peru,* 1950 I.C.J. Rep. 266, at 276).

This universal rule is variously interpreted by the Appellants and their supporting amici curiae so as to benefit some foreign owners or not, depending upon how the rule is stated.

Third, the Appellants and their supporters state, Congress itself has changed this nondiscriminatory property tax into a federal regulation, so that foreign enterprises in general, or those engaging in commerce in particular, are not subject to the same taxes as the rest of the people and businesses coming into the taxing jurisdiction and doing business there.

B. The Constitutional Framework of State Action.

At the root of much of the Appellants' discussion is the fundamental assumption that the Constitution does not leave any real sovereignty in the States. Although their powers to regulate commerce may have been severely restricted in the last century because of expanding Congressional activity in the field, the federal system in this country involves the assignment of powers to the different governments (See Wheare,

"Federal Government" 3d Ed. 1953 Oxford, pp. 1-34). Thus logically, the States' authority in exacting the powers left exclusively to them, is not subject to dispute from any quarter.[19]

Of course, the Constitution gives the power to regulate commerce to Congress, and like the bankruptcy and militia powers, the States were entitled to operate in those areas only until Congress exercised the same power so as to displace them (*Sturges v. Crownshield,* 17 U.S. 122 (1819); *Houston v. Moore,* 18 U.S. 1 (1820); *Colley v. Board of Port Wardens,* 54 U.S. 299 (1854)) makes this rule explicit. Cooley specifically states that the power of taxation is able to be held by the states and the federal government at the same time, and refers to Federalist Papers No. 32. The uniformity in foreign commerce required by that case is the uniformity of regulation (pp. 318-319). It is clear that federal permission and encouragement to undertake interstate and foreign commerce do not deprive the States of the right to tax property in the taxing jurisdiction (*Western Union Telegraph Co v. Taggart, supra*), even if the company has a foreign home office (*Maine v. Grand Trunk Ry. of Canada, supra; Canadian Pacific R. Co. v. King*

[19] That is not to say that State powers can be exerted so as to regulate commerce (*Boston Stock Exchange v. New York Tax Comm.,* 429 U.S. 318 (1977)), or to deny any person equality under the law or due process (U.S. Const. 14th Amend.). It means that once having exerted their power so as not to do that which is within Congress' power, and so as not to violate the Constitution, the States' power ". . . is not bound to yield." (Justice Taney's opinion in *The License Cases, supra,* pp. 581-582).

Co., (Wash. 1916), 155 Pac. 416, or if the property comes from abroad (*Michelin Tire Corp. v. Wages, supra*).[20]

But the Appellants and their supporting *amici curiae* assume that a uniform nonregulatory tax is a regulation of commerce and is therefore subject to alteration by the central government. As pointed out previously, this is not true as long as the States operate within their powers, of course. In *Gibbons v. Ogden, supra,* Chief Justice Marshall was faced with this very question. He defined regulation as the prescription of rules by which commerce may be conducted (22 U.S. at p. 196) but at the same time clearly distinguished between taxation and regulation (22 U.S. at pp. 202-203) (also see *The License Cases, supra*).

The division of powers concept has been supported repeatedly by this Court (see *Texas v. White,* 74 U.S. 700, 725 (1869)).

It is also logical. If the central government were to order California to create an exemption for foreign goods or enterprises in such a way that a foreign rope dealer operating in California would be benefited, for instance, one would believe that the central government intended to benefit some American interest. That is the claim made here, *i.e.*, that the United States requires this exemption power to receive reciprocal benefits for American enterprises. In the example cited,

[20]The *amicus curiae* brief on behalf of the foreign airlines asserts that they all expected exemptions and therefore were entitled to them on a constitutional basis. The only reliance anyone could reasonably have in the home port doctrine's application to property having a constant presence was that encouraged by *Scandinavian Airlines System, Inc. v. County of Los Angeles*, 56 Cal.2d 11, 14 Cal.Rptr. 25, 363 P.2d 25 (1963), *cert. den.* 368 U.S. 899.

the American interest may be a Southern string manufacturing industry. But to ask the people and businesses operating in California to be the only support for the benefit ultimately received by Southern employees is not logical. The support for national interests should come from the national treasury rather than from alteration of policies belonging to some of the States. In that way the national taxpayers, all of us, help support the national interest. We do this on a uniform basis rather than on the basis of the amount and kind of State taxes imposed which will vary from State to State.

The Federal Government has both the resources and the flexibility to engage in the day-to-day shifts required to conduct foreign policy. To actually impose some broad-brush exemption on the States in favor of some part of foreign commerce will defeat the product-by-product changes which the executive department is empowered to make (see the Tariff Act of 1974, 19 U.S.C. §§2102 and 2253) and which in fact it has made, *e.g.*, against "CB" radios (see, Wall Street Journal of March 29, 1978).

At the same time a nondiscriminatory tax levied consistently on interstate and foreign commerce alike, and in proportion to the extent of taxpayer activity in the state,

> ". . . can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce . . . . By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importa-

> tion in a manner inconsistent with federal regulation." (*Michelin Tire Corp. v. Wages, supra,* at p. 286.)

This Court thus disposed of the argument that increasing the cost of foreign commerce nullified a State tax automatically.

But that *Michelin* quotation goes even further in shedding light on what the Appellants seek to accomplish. They wish to impose a rule on the States which will automatically ". . . encourage . . . importation in a manner inconsistent with (prior) federal regulation." (*Michelin Tire Corp. v. Wages, supra,* at p. 286.) As previously pointed out, a surcharge has been imposed on imported "CB" radios in order to counter threats to domestic production. The Appellants seek to reduce the tax cost of importing such articles to a point below that imposed upon interstate shipments of the same products by the same means.

By its very nature, the foreign preference argument cuts against the ability of the federal government to regulate commerce if accepted as a Constitutional mandate. The foreign preference argument, if accepted as a power of Congress, allows the Federal Government to make exemptions from the States' tax base *without being responsible to the people for the carrying out of the States' responsibilities.* The invitation for abuse inherent in such a system is obvious. The "superior" legislature's members would be under pressure to cut the States' tax base while the "inferior" legislatures would be responsible to their constituents for any reduction in service. No federal system will survive with such encouragement.

It now remains to consider the application of the foreign preference argument on the Constitutional, treaty, and regulatory provision relied on by the Appellants.

II.

THE CONSTITUTION ITSELF DOES NOT MANDATE A PREFERENCE FOR FOREIGN ENTERPRISES DOING BUSINESS IN A STATE.

The Appellants and their supporting *amici curiae* postulate as a constitutional, and therefore invariable, rule, an exemption for these cargo shipping containers. They suggest that foreign commerce is more "untouchable" than interstate commerce and must be granted an exemption, not from user fees, but from general taxes. It is difficult to discern whether this claim is made for all enterprises engaging in foreign commerce or those whose place of incorporation is in another country. Also unanswered is the question of whether the rule changes if a container lessor is domestic while the lessee is foreign. (This facet is covered in some depth in the brief of the Multi-State Tax Commission.) In any case, say the Appellants, the States may not tax their property (or that operated by them).

Whether utilizing the import-export clause or the commerce clause, the Appellants and their supporting *amici curiae* assert that the federal activity in foreign commerce would be nullified by this tax. But they make these claims in the face of *Michelin Tire Corp.*

v. Wages, supra; Dept. of Revenue v. Washington, etc. Stevedoring Cos., supra; Bass, Ratcliff & Gretton Ltd. v. Tax Comm., supra; Maine v. Grand Trunk Ry. Co. of Canada, supra; and *Clyde Mallory Lines v. Alabama,* 296 U.S. 261 (1935). It is difficult to see how the taxes and fees in those cases would impair the federal government's operation any less than the tax in this case.

The Appellants distinguish *Michelin* and *Washington Stevedoring* on the ground that the actual person or property taxed is no longer foreign, but to allow one company to avoid taxation because it is foreign, even though it does the same thing is not logical. (What if Japan Lines had no containers but performed its own stevedoring operation here?) It is also countered by *Bass, Ratcliff.* There is no magic constitutional immunity because an entity is foreign. Nor is there one for a foreign company conducting operations as a carrier. But, claim the Appellants, there is one in favor of foreign carriers in foreign commerce. The distinction is hard to see. It is harder still when one considers that these carriers are not immune from fees. (*Clyde Mallory Lines v. Alabama, supra.*)

The Constitution does not make the awkward distinctions the Appellants and their supporting *amici* propose.[21]

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[21]The carriers and the United States emphasize a "blackmail" approach to constitutional interpretation, alleging that many countries will impose an apportioned property tax on U.S.-owned containers. But this approach can be used to nullify this Court's decisions involving the taxability of any foreign company (*Clyde Mallory Lines, supra; Bass, Ratcliff, supra*) or even foreign goods (*Michelin Tire Corp. v. Wages, supra*). For all those taxes and fees involve the possibility of some reciprocal treatment abroad.

A. The Import-Export Clause Does Not Require a Preference for Foreign Owned Property, or That Engaged in Foreign Commerce.

The Appellants assert that because containers (although used as part of a truck or train), are part of a ship, they should be immune from taxation because taxing a ship restrains the ability of the Federal Government to conduct foreign policy, disrupts interstate harmony, and interferes with the free flow of goods (A.B. pp. 38-40). (These are the policies to be served by the Import-Export clause.)

The prohibition of the import-export clause applies to imposts and duties on imports. It is proper to review what imposts and duties are. This Court said,

> "Our independent study persuades us that a nondiscriminatory ad valorem property tax is not the type of state exaction which the framers of the Constitution or the Court in Brown had in mind as being an 'impost' or 'duty' . . . ." (*Michelin Tire Corp. v. Wages, supra,* at p. 283.)

Impost and duties are levies discriminating against imported goods as such (see Crosky, "Politics and the Constitution in the History of the United States," Chicago U. Press (1953) pp. 295-323). There is no reason to regard the nondiscriminatory tax, apportioned in such a way so as to tax only instate activity, as discriminating against importers (*Michelin, supra,* at p. 286).

Thus, such a tax does not run contrary to any Import-Export Clause policy:

(1) The Federal Government can easily make adjustments in national taxes so as to favor one import over another. Reducing the tax on goods

travelling by only one means inhibits that process;

(2) The harmony between the states of this country is obviously not disturbed by a tax which is apportioned so as to reflect only in-state activity. (See *Pullman's Palace Car Co. v. Pennsylvania, supra; Michelin Tire Corp. v. Wages, supra;* and *Dept. of Rev. v. Assoc. of Wash. Stevedoring Cos., supra*);

(3) A tax which increases the cost of goods does not, on that account, become an interference with foreign commerce (*Michelin, supra,* p. 286; and *Washington Stevedoring, supra,* p. 1398), nor does a tax whose proceeds are used to educate the workforce and police force, or to prevent floods.

Thus, the uniform, apportioned tax on property in the jurisdiction is not an impost or a duty simply because it is imposed upon a corporation whose office is located in a different country.

But the Appellants further assert that the Import-Export Clause is violated because the tax constitutes a transit fee. In essence, they argue that any general tax, is such a fee. Alternatively, they suggest that a tax on goods in transit is prohibited (A.B. pp. 40-43).

Of course, much of the discussion is based upon the assumption that any general tax is not related to governmental services. This assumption has already been addressed in this brief. The claim that this is a tax on goods is directly refuted by *Canton R.R. Co. v. Rogan,* 340 U.S. 511, 514-515 (1951); and *Department of Revenue v. Assoc. of Washington Stevedoring Co., supra,* at p. 1402.[22] The idea that an apportioned tax on instrumentalities of commerce is a tax on property in transit rests on the idea that the continuous presence theory is not valid. But as this Court said in *Pullman's Palace Car Co. v. Pennsylvania, supra,* at p. 23:

> "It is equally well settled that there is *nothing* in the Constitution or law of the United States which prevents a state from taxing personal property, employed in interstate *or foreign* commerce, like other personal property within its jurisdiction (*Delaware Railroad Tax,* 18 Wall 206, 232; *Telegraph Co. v. Texas,* 105 U.S. 460, 464; *Ferry Co. v. Pennsylvania,* 114 U.S. 196, 206; *Telegraph Co. v. Attorney General,* 125 U.S. 530, 549; Marye *v.* Railroad Co., 127 U.S. 117, 124; *LeLoup v. Mobile,* 127 U.S. 640, 649)." (Emphasis added.)

The reliance of the Appellants on fee cases in order to support their contentions regarding user fees has also been discussed.[23]

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[22] Appellants assert that this property tax is the same as the taxes imposed in *Thames & MM Ins. Co. v. U.S.,* 237 U.S. 19 (1915) and *Fairbank v. U.S.,* 181 U.S. 283 (1901) (A.B. p. 42 fn. 11). Both those cases were distinguished from a general tax on the transporting company in *Canton R.R. Co. v. Rogan, supra,* p. 514. In addition, the federal prohibition in those cases is against any "tax" on exports (Art. I, Section 9, Clause 5), not just on "imposts" and "duties" (Art. I, Section 10, Clause 2).

[23] They rely on *Keokuk Packet Co. v. Keokuk,* 95 U.S. 80 (1876); *Massachusetts v. United States, supra; Ray v. Atlantic Richfield Co.,* .... U.S. ...., 98 S.Ct. 988 (1978); *Bob-Lo Excursion Co. v. Michigan,* 333 U.S. 28 (1948); and similar cases involving regulations of commerce. Of course, these cases deal with both interstate and foreign commerce.

(This footnote is continued on next page)

The Appellants and their supporting *amici curiae* argue that the Commerce Clause requires that the States not oblige a shipping business in foreign commerce to pay any general tax. Of course, their argument must be restricted to foreign-owned businesses, since there is nothing prohibiting a general tax on United States' companies, *Dept. of Revenue v. Assoc. of Washington Stevedoring Cos., supra*). They rely, first, on the idea that this country's courts cannot control other countries' taxing authorities. Therefore, argue the Appellants, the courts must, as a Constitutional principle, tailor a state's taxes to another country's in order to avoid double taxation (A.B. p. 47). (The actuality of this threat is taken up, *supra*). Next, they suggest that since most countries appear not to impose property taxes on containers belonging to foreign countries, the United States should constitutionally prohibit any taxation of any foreign container (A.B. pp.

If applied so as to defeat general taxes, as the Appellants suggest, they would void the taxes approved in *Pullman's Palace Car Co. v. Pennsylvania, supra, Western Union Tel. Co. v. Taggart, supra;* as well as *Canadian Pacific Ry. Co. v. King County, supra,* and *Sea-Land Services, Inc. v. County of Alameda, supra.*

The Appellants also utilize *Pittston Stevedoring Corp. v. Dellaventura,* 544 F. 2d 35, 53 (2d Cir. 1976) and *Leathers Best Inc. v. S.S. Mormaclynx,* 451 F. 2d 800, 815 (2d Cir. 1971) involving maritime insurance and tort rules for the idea that, no matter how used, the containers are part of a ship. Of course, specific ships are not cited because the whole fleet of ships can carry containers. But the containers fit trucks and trains, too (App. pp. 31-32). Thus, the Appellants appear to be saying that the containers being a part of ships is either dependent upon some "pre-emption" that parts of ships have over being a part of anything else, or upon the idea that they are part of a ship most of the time, and are therefore nothing else. Neither possibility is supported by law, or logic. The cases cited obviously do not consider the changing purposes of the containers when taxed here. (*See Sea-Land Services Inc. v. County of Alameda, supra,* at p. 789.)

47-48).[24] Finally, the Appellants (A.B. p. 26) and the Solicitor General suggest that foreign commerce is subject to no taxation or only home port taxation.

The automatic reduction of the States' taxes in order to prevent double taxation solely on the basis of what another country does or does not do seems to be a ponderous rule indeed. It was developed in *Scandinavian Airlines System Inc. v. County of Los Angeles, supra* and rejected in *Sea-Land Services Inc. v. County of Alameda, supra.* (See Clark, *supra,* 4 Pepperdine L.R. footnotes 71, 74, 84 and 100 for a critique of this sort of analysis.) It is also rejected by the idea that foreign law should not automatically prescribe special rules for the treatment of foreigners in this country (see *Republica v. DeLongchamps,* 1 U.S. 111 (1784). Finally, it runs contrary to *Bass, Ratcliff & Gretton Ltd. v. Tax Comm., supra.* To immunize foreign property as a Constitutional matter because foreign countries immunize United States property is to ignore other taxes imposed by that foreign country and would actually encourage foreign countries not

[24]It is interesting that there is no representation by the Appellants or the Secretary of State or any other amicus, that other countries actually follow the home port doctrine by imposing a full ad valorem tax on their ships or containers while pursuing a policy of not taxing foreign containers at all. This aspect of the case is taken up in conjunction with the claim that there is some custom of international law prohibiting the tax in question. It need only be pointed out here that the State Department's letter is exceedingly vague and incomplete. The apparent difficulty in getting the information is reason enough to avoid depending upon what other countries tax and how they tax it. Omitted entirely from any of the considerations put forward by Appellants and their supporters, for instance, is whether other taxes imposed upon U.S. carriers, such as treaty-approved income taxes, go to support the sort of services the Appellants describe as not affecting their property.

to impose property taxes and to use other means for collecting revenue from United States enterprises, so as to benefit their own business.

The commerce clause argument concerning "discrimination" depends for its validity upon the idea that discrimination in the international field is somehow different than in the interstate context and must be restricted to specific property taxes. The idea is that discrimination means that if the international practice is not uniform, the United States must adjust. One assumes that no objection would be made to imposing property taxes on those containers remaining in the taxing jurisdiction over 30 days (see U.S.B. p. 15a), or perhaps on any Afghanistani property in the jurisdiction at all.

In reality, of course, a finding of discrimination does not depend upon what other countries do. The general rule of *Pullman's Palace Car Co. v. Pennsylvania, supra,* is not that property in interstate or foreign commerce may be taxed in the same way as property in another country, but

> ". . . like other personal property within its jurisdiction." (*Supra,* at p. 23).

So, the discrimination prohibited by the commerce clause is not that which adjusts treatment of Virginia's businessmen in France against France's businessmen in California. The discrimination prohibited is the uneven treatment of some or all foreigners by a State's government. The States have *no* authority to regulate foreign commerce so as to *favor or disfavor* it, but

they have the right to tax it (*Michelin Tire Corp. v. Wages, supra; Boston Stock Exchange v. New York State Tax Comm., supra*).[25]

The Appellants rely, for a contrary rule, on *Moorman Manufacturing Co. v. Blair, supra* and particularly the dissent therein (A.B. p. 47). The difficulty in that case was not that a tax was imposed, but that the method of determining the tax base was not the most accurate. The Appellants have not stated, at any point in these proceedings, that California's apportionment method inaccurately described the presence of the property in the jurisdiction. The ability of Iowa to tax on a properly apportioned base was not in dispute in *Moorman.* The Appellants here make the argument that other jurisdictions' ability to tax prevents *any* taxation at all.

Finally, the Appellants and their supporting *amici* seek to carve out of the general rules, a domain of non-taxability of foreign commerce by the States. Insofar as they rely on the simple fact of a tax's being prohibited because it may increase the price of goods or because it taxes commerce regulated by the Federal Government, their arguments are refuted by *Michelin Tire Corp. v. Wages, supra,* at p. 286; *Pullman's Palace Car Co. v. Pennsylvania, supra,* at p. 23; *Leloup v.*

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[25]It is true that taxes can be used in such a way as to be regulatory in their effect (see *Sinnot v. Davenport,* 63 U.S. 227 (1859) and *Hines v. Davidowitz,* 312 U.S. 52 (1951)). But, with the exception of the Appellants' argument to the effect that a foreign country's tax changes a U.S. tax into a regulation because the foreign tax would be unconstitutional in the U.S., that question is not presented here.

Mobile, supra at 649; *Clyde Mallory Lines v. Alabama, supra; Washington Stevedoring, supra;* and *Bass, Ratcliff & Gretton Ltd. v. Tax Comm., supra.* As already pointed out, a Constitutional prohibition which actually causes a preference for foreign goods works against federal regulations rather than for them. The Federal Government can do its regulatory job best against a background of nondiscriminatory state taxation. The Appellants' reliance upon *Gibbons v. Ogden, supra,* is misplaced. Chief Justice Marshall specifically distinguished between the States' power to regulate in the absence of federal regulation and the States' power to tax property in its jurisdiction, which is ". . . sacred . . ." (*Brown v. Maryland,* 25 U.S. (12 Wheat.) at p. 448) and ". . . most absolute and unqualified . . ." (Federalist Papers No. 32) (See *Gibbons v. Ogden,* 22 U.S. at pp. 197-200). Thus, the grant of the power to regulate does not, as the Appellants suggest, prohibit State general taxation of foreign commerce (see *Pullman's Palace Car Co. v. Pennsylvania, supra,* at p. 23, quoted above).[26]

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[26]The Appellants appear to rely on *Brown v. Maryland, supra; Philadelphia & Southern Mail SS Co. v. Pennsylvania,* 122 U.S. 326 (1887); *Philadelphia & Reading R. Co. v. Pennsylvania,* 82 U.S. (15 Wall.) 232 (1873); *Bowman v. Chicago & N. Ry. Co.,* 125 U.S. 465 (1888) and *Chy Lung v. Freeman,* 92 U.S. 275, 179 (1875) (A.B. p. 27); *Brown v. Maryland's* commerce clause discussion deals with importers being subjected to taxes on a discriminatory basis. *Philadelphia & Reading R. Co. v. Pennsylvania* involves a gross receipts tax on all of the receipts of an interstate carrier allowed in 1873, seventeen years before *Pullman's Palace Car Co. v. Pennsylvania, supra.* The Court separated the States' taxation of foreign commerce as opposed to interstate commerce on the basis of the *Import-Export Clause,* not on the power of Congress to regulate commerce as the Appellants suppose. The requirements of the *Import-Export Clause* have been discussed, *supra. Bowman v. Chicago & Northwest RR Co.,* 125 U.S. 465 refers to certain opinions in *The License Cases, supra.* Its general conclusions regarding those opinions (125 U.S. at pp. 479-480) do not mention a different degree of State activity in foreign as opposed to interstate commerce. In fact, the Court states, quoting from the *State Freight Tax case,* 82 U.S. 232:

> "The (commerce clause) power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations." (125 U.S. at p. 480).

Also see 125 U.S. at pp. 482, 485-486; *Chy Lung v. Freeman,* 92 U.S. 275 (1876) invalidates a discriminatory statute on the basis of the embarrassment caused to the general government. It discusses the power to regulate foreign commerce, but does not compare it to the power over interstate commerce. But the most important thing about these cases is that they do not deal with state taxation. As said in *Philadelphia & Reading R. Co. v. Pennsylvania, supra,* at p. 293:

> "We think it may safely be asserted that the states have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent may be essential to the healthy existence of the state governments, and the Federal Constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their efficient existence."

The Court goes on to define the time that a tax becomes prohibited, *i.e.,* when it becomes *regulatory.*

Finally, the Appellants describe *Ott v. Mississippi Barge Lines,* 336 U.S. 169 (1949) as "careful not to abrogate the validity of the 'Home Port' rule in the case of instrumentalities used exclusively in foreign commerce." Any reading of the case shows that it was "ocean carriage" which was not ruled upon by the Court.

The Appellants' arguments regarding the home port doctrine seeks to distinguish foreign commerce from interstate commerce (A.B. pp. 23-25). But the arguments merely force the old situs rule into the mold which renders these containers immune. Regardless of the Constitutional provision relied upon by the Appellants—they cite none—the distinction is not foreign commerce but the continuity of the presence.

> "Ships or vessels, indeed, engaged in *interstate or foreign* commerce upon the high seas *or other waters* which are a common highway [and there-

> fore not a domain of state taxation], and having their home port, at which they are registered under the laws of the United States at the domicile of their owners, in one state, are not subject to taxation in another state at whose ports they *incidentally and temporarily* touch for the purpose of delivering or receiving passengers or freight. *But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction,* and therefore can be taxed only at their legal situs—their home port and the domicile of their owners. [Citing cases upon which Appellants rely]." (*Pullman's Palace Car Co. v. Pennsylvania, supra,* at p. 23) (Emphasis added).

Thus the high seas are not a place where the states can exercise their jurisdiction but having been on the high seas does not imbue property with some mysterious tax-proof clothing. If it is otherwise taxable, water transportation property is not immune because of its activity.

Of course, these containers are made for land transportation, and not only create the continuous presence required, but also take advantage of local and state services throughout the taxing jurisdiction. (See *Sea-Land Services Inc. v. County of Alameda, supra,* at 775 and 789.)

III.

THERE IS NO CUSTOM OF INTERNATIONAL LAW REQUIRING THAT CONTAINERS BE IMMUNE FROM ANY PROPERTY TAXES.

The Appellants and their supporting *amici curiae* suggest that the home port doctrine is of such pervasive use that the cargo containers in question simply may not be taxed (A.B. pp. 24-27, 28 *et seq.*). In order to oblige a nation or its subdivisions to conform to such a rule, it is necessary that there be a rule binding upon the nations. The Appellants and their supporting *amici* do not rely upon the actual use of the home port concept by foreign countries. They assert only that some countries do not impose property taxes on foreign cargo containers some of the time.

Even assuming that failure to impose a property tax on foreign containers means that the country in question is imposing a full tax on its own nation's containers, the usage alleged by the Appellants and their supporters must show a custom of international law.

> "The law [referring to customary maritime rules of the sea] is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities." (*Sears v. The Scotia,* 81 U.S. (14 Wall.) 170, 187 (1872).)

Again, assuming that non-taxation of U.S. containers means a home port rule, the Appellants do not show any such consistency. (The Solicitor General does not explain whether Afghanistan imposes a full value or an apportioned basis, but it does impose a property tax on foreign containers.) Most importantly, according

to Appellants at least one of our major trading partners (Germany) will impose a property tax on containers remaining in the taxing jurisdiction over 30 days. *Thus some of the containers taxed here would be taxed there,* possibly on a full value basis.

On the contrary, there is a rule of international law which is accepted even by the United States Department of State: national treatment. Andreas Roth in his "International Law Applied to Aliens" (1949) describes this rule and reflects upon the rule of foreign preference urged on this Court by the Appellants and their supporting *amici curiae.*

> "The doctrine of 'national treatment' or equality doctrine sums up the rules of treatment of aliens by saying that the international obligations of the State [*i.e.,* nation] are discharged from the moment that it has put the alien on a footing of complete equality in everything pertaining to civil or private rights. This theory starts from the major postulate that the aliens must accept the legal conditions which he finds in the country of residence, and that neither he nor his government can justifiably complain if he is accorded, like nationals, the benefit or application of these conditions." (p. 62).

> "To admit that the alien may have more rights than the national of the State, when he enjoys hospitality, *would be an insult to the nationals.* . . . [I]f an alien could demand indemnities for damages created by a legislative disposition, then the State would no longer be sovereign in its territory and its power and free will would in the end be subject to a foreign authority.

> "The 'national treatment' seems therefore to be in the eyes of many authors, the *only* principle which could guide the relations between the State and the alien in the spirit of positive international law. Not only can the alien have no more rights than the national, but even equality with the national is considered to be the maximum of treatment the alien can expect and to be likely to remain an idealistic postulate." (pp. 64-65).

The United States has rather consistently followed this practice (Roth, *supra,* at p. 64; Hakworth Digest of International Law Vol. II, pp. 56-57) and has specifically told U.S. citizens residing abroad not to expect anything better. (See letter from the Second Assistant Secretary of State to August Gross, June 29, 1921, Hakworth, *supra,* Vol. III, p. 575.) In dealing with a tax on capital stock (the same as in *Pullman's Palace Car Co. v. Pennsylvania, supra*) our own State Department has told American citizens:

> "As a general rule, it may be stated that nations possess the exclusive right of imposing taxes upon property situated within their territories and of determining the purpose to which the revenues derived from such taxes shall be devoted. If, therefore, the taxes to which you refer are general and uniform in the operation, and make no discrimination against the property of American citizens, it would not ordinarily be within the province of this Government to make any representations in regard thereto." (Hakworth, *supra,* p. 576).

The Appellants' claim of an international rule of reciprocity is not supported by the facts and logically it derogates from the power of the United States govern-

ment.[27] Any general levy relating to this property would be prohibited, not just to the States, but to the central government itself.

IV.

TREATIES CANNOT AND DO NOT VOID NONDISCRIMINATORY STATE TAXATION OF PROPERTY CONSTANTLY IN THE TAXING JURISDICTION.

A. Introduction — Congress May Not Expand Its Powers Over the States by Treaty.

Much that has been said regarding Congress' ability to make a nonregulatory State tax into a federal regulation applies at this point. The Appellants appear to rely on *Missouri v. Holland,* 252 U.S. 416 for the proposition that treaties by their own force add powers to Congress not otherwise there. (A.B. p. 28.) But the case involves the *regulation* of foreign affairs,

[27]The cases cited by Appellants actually support this Court's application of national treatment. Contrary to Appellants suggestion, *Jordan v. Tashiro,* 278 U.S. 123 applies the rule of *equality* and reciprocity, not the automatic reciprocity which takes away national sovereignty as urged by the Appellants. *Shanks v. Dupont,* 28 U.S. (3 Pet.) 242 (1829); *Hauenstein v. Lynham,* 100 U.S. 483 (1880); and *Nielson v. Johnson,* 279 U.S. 47 (1929) show the development of rules of equal treatment, not superior treatment. (It is acknowledged that Congress has prescribed and can prescribe equality and thereby restrain the States from regulating both commerce and foreign affairs).

Both the constitutional and the international custom arguments rest on the automatic grant of reciprocity based upon the act of foreign nations. To see how that automatic grant will operate to deprive a government of its sovereignty, one has only to review *Zschering v. Miller,* 389 U.S. 429 (1968). In that case, the Court refused to allow the State of Oregon to regulate rights in foreign countries on the basis of those countries' political liberties. It seems inappropriate to allow another country to dictate the rights its citizens may claim on the basis of nothing more than the foreign country's usage of a particular tax system.

not the taxation of goods by a State, and supports the federal authority to conduct such regulation *with its own resources,* not the States'. The birds in that case were not seen as the particular property of the State. Taxing property within the State is a sovereign power of the State government (*Lane County v. Oregon, supra,* 76-78; *Union Pacific R.R. Co. v. Peniston, supra,* 29-30 (1873) and other cases cited *supra*). The authority of the States to govern property within their jurisdiction is not made less than their rights under the Constitution simply because a treaty is involved. (*Mayor, etc. of New Orleans v. United States,* 35 U.S. 662, 736 (1836)). The general rule was stated by this Court in *Holden v. Joy,* 84 U.S. 211, 242-243, and *Holmes v. Jennison,* 39 U.S. 540, 569 (1840) (per Taney C.J.):

> "[The treaty power] was designed to include all those subjects which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions *and the distribution of powers between the general and State governments.*" (Emphasis added).[28]

[28]Even the language of the General Agreement on Tariffs and Trade, 61 Stat. (5), (6), TIAS 1700 (hereinafter GATT), acknowledges that the general governments of the parties may not have complete authority over local governments. Part III, Article XXIV, par. 6, states:

> "Each contracting party shall take such reasonable measures as may be available to it to assure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory."

B. The Containers Are Not Immune From Taxation Because the Customs Bureau Receives a Bond to Assure That They Will Not Be Marketed.

Both the Appellants and the Solicitor General suggest that the act of placing property in bond immunizes it from taxation because the lack of duties was meant to encourage the use of cargo containers and taxing them in the same way that entire trucks or railroad cars are taxed would discourage their use. In light of all that has been said about the power of the Federal Government to make a regulation out of State taxes, and the cases holding that the Central Government cannot destroy the States' taxing power, the contention does not appear to be supported.

It should be emphasized that the complete Federal power proposal leaves the States in the position of providing services while unable to collect taxes to support them. The position of the United States would simply allow for the gradual destruction of the States' tax bases while in no way reducing their responsibility to all businesses, both foreign and domestic.

The Solicitor General relies on *People v. Compagnie Generale Transatlantique*, 107 U.S. 59 (1883); and *McGoldrick v. Gulf Oil Co.*, 309 U.S. 414 (1940) (U.S.B. pp. 25-27). Further reliance is placed on the "custom of nations" allowing any general taxes. In turn the existence of this custom of nations is shown, according to the United States, by *Hays v. Pacific Mail SS Co.*, 58 U.S. 546 (1855), and *Keokuk Packet Co. v. Keokuk, supra*. Finally, reliance is placed upon

Parkersburg & Ohio River Transportation Co. v. Parkersburg, 107 U.S. 691, 696 (1883) for the proposition that fees do not run afoul of the Federal Government's regulatory purposes, while general taxes do. (U.S.B. p. 23, fn. 12).

It should be noted that the Container Convention was amended in 1972 so as to omit the bonding requirement. (This is taken up in the Multi-State Tax Commission's Brief.) Subsequent discussion here assumes that no such amendment was made.

(1) A Nondiscriminatory, Apportioned Tax Does Not Cancel Out the Ability of the Federal Government to Regulate by Means of Its Tariff System.

People v. Compagnie Generale Transatlantique, supra, presents the classic case of the state's imposing a fee on aliens. The regulatory character of the levy is clearly recognized by the Court (107 U.S. p. 60), and because it is discriminatory, it can be used to actually thwart the Federal Government's ability to conduct foreign affairs, and levy duties. According to the opinion, the state did not refute this, but attempted to characterize the tax as an inspection fee. The impropriety of such discriminatory levies is not contested by the Appellees. They constitute a regulation because of their discriminatory character.

McGoldrick v. Gulf Oil Co., supra, involved a new sales tax imposed within two years after duties were lifted on imported oil. The amounts were approximately the same. The Court, as pointed out by the United States, focused on this benefit meant to enhance American oil companies' competitive ability and its reduction by the imposition of the sales tax.

The Court did not inquire into the ability of the Federal Government to make exceptions to uniform state taxes. That issue was apparently not presented

to the Court (see summary of arguments 84 L. Ed. 840, *et seq.*). As a result *McGoldrick v. Gulf Oil* does not stand for the existence of the power so explicitly rejected in *Union Pacific R.R. Co. v. Peniston, supra,* and the other cases holding the States' authority to tax inviolate (see also Fed. Papers No. 32). If the Court had come to grips with these prior statements, it might have explored other avenues of regulating commerce than by reducing the States' taxes without reducing their responsibility.

One of the strongest points the *McGoldrick* Court makes is that during the oil's manufacture in New York, it was physically separated from domestic products. Under the rationale of *Low v. Austin, supra* and before *Youngstown Sheet & Tube Co. v. Bowers,* 358 U.S. 534 (1959), the goods would be immune from a uniform state tax under the original package doctrine *until it was ready for sale.* The Court was aware of this fact (309 U.S. at p. 423). But the product was destined for immediate export and so was never really "commingled" with the mass of property in the taxing jurisdiction. For that reason, and because of the Customs Bureau's control of the goods throughout their import-manufacturing-export process, the customs regulations were adequately describing what was believed to be the then-present state of the law regarding the non-taxability of the goods in question (see 309 U.S. at 425-426).

But *Michelin Tire Corp. v. Wages, supra,* would recognize, at least in the case of property taxation, that the States' benefits may be billed to the property taking advantage of them whether it is from a foreign country or from the United States. *Michelin* renders the logic of *McGoldrick* inappropriate. This is especially true in light of the fact that the New York tax took advantage of what was no more than a narrow "window" of tax liability under the old law (after manufacture but before being sent to the ship).

It was quite logical, under the *Low v. Austin* test as then developed, that goods always physically separated from domestic products and never used in the taxing jurisdiction should receive a temporary immunity until they were actually aboard ship. That test never considered the character of the state tax, but simply excluded it as long as the goods were never "commingled with the mass of property" in the taxing jurisdiction.

That rule, and the basis for its application to imports which are later exported, are no longer valid. The recognition of the fact that the States benefit imports by protecting them, by maintaining a good work force to manufacture or move them, and the like, brings with it a recognition that the view of the sacred character of foreign products is no longer proper. Once the role of the States in providing protections, benefits, and opportunities is seen as applying to foreign as well as domestic goods on the same basis, then the fiction that the States must never tax foreign commerce disappears along with the *Freeman v. Hewit* attitude toward interstate commerce.

One should also be aware of factors which make the facts before this Court materially different from those in *McGoldrick.* Perhaps the most important is the lack of segregation and the lack of constant customs supervision. The bond in this case is a constant one, applying to any containers happening to be in the United States. The cargo containers in the United States are free to go anywhere their business takes

them. They may go to any place in Los Angeles County where they will be kept from fire hazard by the County Fire Department. They can be moved by a skilled driver who is on the job because the public health officials see that there is no epidemic. No customs official controls the movement of the containers, or protects them from fire, or provides flood protection, or builds roads. No customs official will respond to a burglary call. *Michelin* recognizes these factors while *McGoldrick*, operating under *Low v. Austin* did not have to consider them. Thus, *McGoldrick* does not answer the rules of *Union Pacific v. Peniston*, or *Michelin Tire Corp. v. Wages* (nor does it apply when the Customs Bureau is not maintaining the foreign property at a special place devoted to its needs).

(2) The Tariff System and the Cancellation of Duties on Containers Was Not Meant to Provide Any Competitive Advantage.[20]

Finally, the competitive advantage reduced by the coincidental application of the tax in *McGoldrick*, is not present here. There is no history of a need to protect American companies' positions in the Container Convention. The only purpose it has is to prevent

[20]Although the foreign air carriers appear to assume that U.S. domestic carriers are not taxed, obviously that is incorrect (*Braniff Airways v. Nebraska Board*, 347 U.S. 590 (1954)). Despite their argument that some detrimental reliance has occurred, the treaty and regulatory provisions applicable to air carriers are not materially different than those applicable to containers. The brief of the Air Transport Association focuses on the international "hue" acquired by this property and the fact that airplane companies pay airport fees. That does not take away from the fact that they also rely on the locality's work force, its flood control, and its public health efforts. Those efforts, as well as general police and fire protection for the areas where the airplanes stop, all support the ability of the airlines to sell tickets in the locality and to service its passengers.

customs duties from being imposed because the containers are not to be sold here. As said by Senator Lausche while introducing the Container Convention at the same time as other agreements adjusting duties,

> "The fourth convention—the Customs Convention on Containers—Executive J, 89th Congress, second session—provides for duty-free temporary entry of those big containers, like lift vans and movable tanks, which are being used increasingly in international trade. . . ." (Cong. Record—Senate 1st Session 90th Cong. p. 4937.)

Unlike *McGoldrick v. Gulf Oil Co., supra*, the United States Brief does not cite any history of attempts to achieve any competitive advantage by means of the Container Convention, only to avoid *duties*. The imposition or non-imposition of duties on property has as little to do with uniform property taxation as tariffs do with the uniform taxes in *Michelin*.

(3) The Tariff System as Postulated Does Not Logically Apply to State Property Taxes Alone.

The United States attempts to restrict the application of its "In Bond Doctrine" to State level property taxes. Because of the inadequate factual information regarding the uses to which foreign fees are put, the State Department fails to show any substantial difference between taxes and fees. If airport fees in Japan go to support schools it would be no different than a general levy supporting schools.

Going beyond the State Department's "facts," the United States claims that fees used for particular services do not frustrate the federal scheme or the "custom of nations" while taxes used to support more than

one service do (U.S.B. p. 15, fn. 7, p. 23, fn. 12). Logically, a fire protection fee in the amount of the sales tax in *McGoldrick* would have been just as counter-productive as the tax was. It was not the uses to which the revenue was put that mattered to the *McGoldrick* court, but the *amount* of the levy (see *Epstein v. Lordi*, 261 F.Supp. 921 (1966) (aff'd 389 U.S. 29) at p. 940). Logically, there is no distinction between a State fee and a State tax in *McGoldrick*.

Reliance is placed upon *Parkersburg Transportation Co.; Keokuk Packet Co.* and *Hays.* As previously pointed out, *Keokuk Packet* deals with the difference between fees and duties. *Hays* merely says that a jurisdiction without situs may make sanitary regulations while not able to tax. *Parkersburg & Ohio River Transportation Co.* contrasts fees with tonnage duties, which even the United States admits this tax is not. (U.S.B. p. 30, fn. 23). So none of these cases show the distinction the United States seeks to make.[30] The Appellants' "In Bond Doctrine" is not logical.

The primary difficulty with the United States' position is that it seeks to press upon the States the automatic duty to impose fees rather than multi-purpose taxes, or in the alternative to automatically increase the "encouragement" afforded containers and other property. It should be emphasized that this additional exemption is afforded *only* if the containers are in foreign commerce. The containers of Sea-Land Services, Inc. going from Hawaii to California would, under the "In Bond Doctrine," be obliged to pay taxes. They are not given

[30]The United States is assuming, like the Appellants, that there is no benefit accorded to the property by landward protection, or skilled and available police, fire and work forces.

any benefit by the Federal customs regulations. Other obvious difficulties present themselves. The "encouragement" automatically added by a State tax exemption will vary from state to state depending upon the State's taxing system and the level of services it provides. It will also vary depending upon the willingness of a State to shift from a general tax to a fee system. In addition, there is no logical reason why the determination of the Federal Government's "perceived need for nationwide uniformity" does not also apply to tariffs, causing the States to automatically adjust their taxes so as to add to the "encouragement" given by a low tariff on a certain product. The possibilities, when one also considers the activities of the Interstate Commerce Commission, are endless.

A uniform State tax does not cancel a competitive advantage, as this Court stated in *Michelin.* It allows the Federal Government to give precisely the encouragement it wants. The fluctuations of competition are best met by the Federal Government and are most easily achieved by adjusting one schedule which is national in scope. To call upon the States to shift their taxes and their fees from all the people and property enjoying its services to only a few, and then shifting them back again, depending upon the perceptions of Congress, the Customs Bureau, or the ICC is both contrary to the federal system and foolhardy.

Equally impractical and unfair is the cancelling of a California property tax in order that a business operating out of Virginia may receive a benefit abroad.

The "In Bond Doctrine" is a poor and complicated substitute for the federal system, and is rejected by *Michelin's* view of a nondiscriminatory tax's effect on

federal regulations (see *Clark, supra*). Congress may prevent the States from regulating foreign commerce (see *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324 (1964) and *Dept. of Alcoholic Bev. Control v. Ammex Warehouse*, 224 F.Supp. 546 (1963)) but may not turn a State tax into a regulation.

There is no evidence that it ever intended to do so.

C. This Country's Friendship, Commerce and Navigation Treaties, and GATT Do Not Create a Regulation From a Nondiscriminatory Tax.

The Appellants rely on Articles XI(1), 4, and XXII (2) of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 UST 2063, TIAS 2863 (hereinafter FCN Treaty with Japan) for the proposition that the federal government intended to adjust the normal rule of national treatment by putting in its place a rule of automatic reciprocity.[31]

FCN Art. XI(1) calls for national treatment. The requirement of that paragraph calls for uniformity between nationals and aliens ". . . within the territories of such other party . . . ."[32] Thus, the treaty establishes the general rule of national treatment, as the Solicitor General points out (U.S.B. p. 23, fn. 13). In addition, the FCN treaties prohibit one country from taxing the nationals of another country on any larger basis than that apportioned to the first country's territory.

[31]The dangers of loss of internal governmental control by the creation of such a rule have already been described. The Solicitor General, quite naturally, seeks to avoid the automatic reciprocity rule when it could cut into the ability of the Central Government to levy taxes (see U.S.B. fn. 13).

[32]This language does not appear in the Appellants' version (compare A.B. p. 4a with the FCN Treaty itself).

Of course, without apportionment it is likely that Country A could tax all of the income of a national of Country B and not run afoul of the rule of national treatment. All national taxes have been the subject of apportionment principles by treaty for some time (see 52 Minn. L.R. 1261).

It is at this point that the Appellants assert that, assuming Japan taxes its own containers on a full ad valorem basis (or at all), the United States is pre-empted from any property tax. But the terms of the treaty do not prohibit a total of more than one full tax. They prohibit the non-resident country from imposing more than an apportioned tax. The treaty is silent as to the rights of a country regarding its own nationals.

Finally, the Appellants turn to the Federal and State regulations cited above for the proposition that failure to comply with Federal regulations on entry means that the cargo containers do not provide any presence to apportion, and that a State regulation interpreted by the California Supreme Court not to prohibit taxing containers, does in fact prohibit them. These arguments have already been discussed, and the character of "entry" for customs purposes has been pointed out, but it is worth noting that nothing in the FCN treaty calls for reliance upon such fictions in order to arrive at a proper apportionment.

Thus the FCN treaties do not provide the automatic reciprocity the Appellants urge. In fact in the one reference in the FCN treaty dealing with the States and localities, the Japanese nationals are accorded the same treatment as U.S. nationals from other states (FCN Treaty Article XXII(4)).

The Appellants next assert that the tax is prohibited by GATT's requirement that taxes not be imposed "so as to afford protection to domestic production." The Appellants do not appear to have any disagreement with the tax's complying with Article III, par. 2. But assert that, combined with the assumption of full ad valorem taxes on cargo containers, the California tax is applied "so as to afford protection to domestic production." Of course, the "reciprocal interpretation" invites nations to utilize home-port-type taxes of every sort in order to prevent taxation abroad and is thus logically without foundation. But, in addition, one of the interpretive notes to Article III, par. 2, is instructive. Paragraph 2 requires national treatment, but also (in a portion left unquoted by the Appellants) requires additional compliance with paragraph 1. The interpretive note in Annex I, "ad Article III," par. 2, states that a national treatment tax will not violate paragraph 1 unless particular competing products are taxed differently. The intention not to consider the "reciprocal interpretation" is clear from this note.

D. The Statutes Relating to Tonnage Duties and the Container Convention Do Not Seek to Prohibit Uniformly Applied State Taxes.

The Appellants rely on 46 U.S.C. Secs. 121, 128, 135, 141, 142, and 146 for the proposition that they prescribe a reciprocal exemption from property taxes. Of course, those sections deal with tonnage duties and discriminatory duties. Property taxes are not included (*State Tonnage Tax Cases, supra*).

The Appellants and the Solicitor General assume that the Container Convention can make a federal regulation out of a State tax. The principal thrust of the United States' position has been discussed. The Solicitor General invites this Court to avoid this inquiry and to simply determine that the Federal Government has done "something" to containers and has thereby impliedly declared that the States may not tax them. But if the Federal Government has dealt only with import taxes, *i.e.*, duties, the effect is nothing more than a tariff or a lack thereof. The imposition, or non-imposition, of tariffs without more, does not mean that the States may not levy nondiscriminatory taxes on imported goods because such taxes do not impede Federal regulations (*Michelin Tire Corp. v. Wages, supra,* at p. 286). The idea that foreign commerce has a constitutionally protected "tax-free zone" has also been discussed.

The Appellants appear to contend that a nondiscriminatory property tax falls within the ambit of the Convention itself because it is a tax imposed "by reason of importation" (Customs Convention on Containers, 20 UST 301, TIAS 6634, Chap. I, Art. I(a)). Logically, this theory would call for prohibiting all taxes and fees. As the United States Brief states in connection with the Import-Export Clause:

> ". . . it is difficult to contend that the California tax levied on the general mass of property within the state, is a tax 'directed at imports or commercial activity as such.' " (U.S.B. p. 31, fn. 23).

Of course, the Appellants' logic is rejected by *Michelin Tire Corp. v. Wages, supra*. In addition, there is no showing that Congress intended to give container shippers any competitive advantage over conventional ones.[33]

V.
THE APPELLANTS' THREAT OF DOUBLE TAXATION IS ILLOGICAL.

Whether grounded on the Constitution or the automatic reciprocity concept, the Appellants and their supporting *amici* urge this Court to rely on the possibility of double taxation. They urge this Court to adopt the home port doctrine for foreign-owned instrumentalities of commerce. The use of that doctrine would mean that a country would be able to fully tax containers to which it may give *no* benefits (if the instrumentality of commerce was never present there) (see *Southern Pacific v. Kentucky*, 222 U.S. 63 (1911) where the Court held that the lack of benefits did not matter).

But even the imposition of the home port concept by the Court will not stop Afghanistan from taxing the containers going there, nor will it stop the countries utilizing the 30 day-6 months rules (or any other time limit) for the containers that stay longer (in this case possibly up to six months, App. p. 31).

This Court does not have the authority to bind all countries to the home-port system any more than it has the authority to bind the countries to a system

[33]In fact 19 CFR §10.41(a) and §123 deal with other forms of transportation without requiring the security of a bond. Thus, Canadian "CB" radios, although travelling in foreign commerce would not, under the United States' arguments, receive the same treatment as Japanese, thus triggering the most-favored-nation provisions of our treaties.

of apportionment, and in all probability no system, no matter how much it favors shippers, will be adopted by all countries. The Appellants and their supporting *amici* have not cited one country that applies a full ad valorem tax on its containers while exempting all foreign ones. Even if they could, there is no control that the Court can exert that would force all of the countries to follow suit.

The double taxation threat is no less if the home port doctrine is established. One would assume that New York could then impose a full tax on Sea-Land's containers in foreign commerce, but that still does not cancel Germany's 30-day rule or Afghanistan's taxes.

Most importantly, the double taxation threat is premised on the assumption that other countries utilize the same overall tax systems that we do. It assumes that the central governments of other countries do not support local services by means of taxes and fees which are imposed on U.S. carriers. The "competitive advantage" portion of the threat argument assumes that rates in other countries are the same as ours. These assumptions are simply not supported. Even if they were today, they could change tomorrow. Blindly guaranteeing a certain kind of shipper that it will be subsidized by the people of this country is an "insult" to the people of this country (Roth, *supra*). They deserve better.

The best that this Court and this country can do is to provide even-handed tax treatment for enterprises similarly situated. The best we can do is to see that Japanese containers and Canadian railroad cars are given the same services and the same benefits as our

own. The best that we can do is to see that they pay their share for those benefits, as our containers, railroad cars, and airplanes do, so that the goods they carry will reflect the full cost of delivery. Both the shippers and other businesses deserve this equality of treatment.

No more, and no less.

Conclusion.

The nineteenth century cases upon which Appellants and their supporting *amici curiae* rely do not reject the idea of apportionment of property utilized in both foreign and interstate commerce. It is only when taxes are imposed on the basis of property having no situs in the nondomiciliary jurisdiction, or when the tax is not apportioned (as in the *State Freight Tax Case, supra*) that the Court has disallowed state taxes. As long as either full situs or an apportioned presence is involved, the Courts have validated a tax on such property.

The Appellants and their supporting *amici curiae* fundamentally base their arguments on the possibility that the international community will shift from not taxing U.S. owned instrumentalities to taxing them on the basis of their actual presence in the taxing jurisdiction. No fairer or more accurate rule can be imagined.

The Appellants assert that U.S. container companies will suffer because they have more presence abroad than at home. In light of the reduction in California's property tax to 1% (see Cal. Const. Arts. XIIIA and XIII §2), the actual money difference will not be substantial (the Sea-Land Brief assumes that foreign taxes will be in amounts similar to California's). In

any case, foreign carriers will be taxed in this country as well.

Canadian railroad cars are taxed in this country (see *Canadian Pacific Ry. Co. v. King County, supra*) and have been for some time. It is difficult to say that one sort of instrumentality should be treated differently than any other.

Equal taxation by the States will allow the Federal Government to accurately pinpoint and solve problems of competitive advantage in keeping with national needs and still allow the States to derive support for the services they provide from all the property in the jurisdiction.

To do anything else, to freeze a foreign preference into the Constitution or to establish an "In Bond Doctrine" is to shut off Federal flexibility and to require a substantial shift in State tax burdens on to U.S. businesses and residents. Taxation is, to many businessmen, a thing to be fought wherever encountered. But to do so on the basis proposed by the Appellants is shortsighted and will engraft onto the Federal system an automatic preference for foreign goods and enterprises having no benefit for the people of this country.

Respectfully submitted,

JOHN H. LARSON,
County Counsel,
JAMES DEXTER CLARK,
Deputy County Counsel,
Counsel for Appellees.

Staff Assistants:
MARY MAYER,
GREASON HAWORTH,
LAWRENCE S. RUBINSON,
LINDA VAN WINKLE.

Service of the within and receipt of a copy thereof is hereby admitted this .... day of October, A.D. 1978.

FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

vs.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

On Appeal From the Supreme Court of the State of California.

APPELLEES' SUPPLEMENTAL BRIEF.

JOHN H. LARSON,
County Counsel,

JAMES DEXTER CLARK,
Deputy County Counsel,
648 Hall of Administration,
Los Angeles, Calif. 90012,
(213) 974-1833,

Counsel for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Appellees.

On Appeal From the Supreme Court of the State of California.

APPELLEES' SUPPLEMENTAL BRIEF.

Introduction.

This Supplemental Brief on behalf of the Appellees is meant to discuss an opinion by the California Court of Appeal in *Zee Toys, et al., v. County of Los Angeles,* 2d Civ. Nos. 52977 and 53695 and *Sears, Roebuck & Co. v. County of Los Angeles,* 2d Civ. No. 53306, consolidated for appeal and hereinafter referred to as *Zee Toys. That opinion is published at* 85 Cal.App. 3d 763, 149 Cal.Rptr. 750. Although filed by the Appellate Court on October 25th, it was not received until October 30th.

The Case.

Zee Toys involves a tax statute which makes tax distinctions between goods traveling in foreign commerce and those traveling in interstate commerce (as well as other distinctions between types of foreign commerce). The exemption in favor of foreign goods on their way to other states was perceived as aiding California's importing industry. The Court, nevertheless, saw the regulatory effect of such legislation, and struck down the exemption, relying on *Boston Stock Exchange v. State Tax Comm.*, 429 U.S. 318 (1977). The Appellate Court, in *Zee Toys*, did not conceive of the *imposition* of uniform property taxes as regulatory, and in fact, resolved the problem by striking the exemption rather than expanding it. At the same time the Court had before it many of the devices of Federal regulation, including tariff preferences and "penalties" for various goods.

The place of the States in the Federal regulation of commerce is clear from this case: Federal regulation can take place at the same time the States apply uniform taxation.

Thus, as pointed out in the Amicus Curiae Brief for the City of Houston, Texas, a State tax is subject to preemption by Federal regulations if it is regulatory. But nonregulatory taxes cannot be cancelled by Federal regulations of commerce. *Cooley v. Board of Port Wardens*, 53 U.S. 299 (1851) at p. 319:

> ". . . that it is not the mere existence of such a power, but its exercise by Congress, which may be imcompatible with the exercise of the *same* power by the States . . ."

While admitting the possibility of the Federal Government's taxing a thing to such an extent as to preclude the States from taxing the same thing, The Federalist No. 32 (Hamilton) states:

> ". . . that an attempt on the part of the national government to abridge them in the exercise of [the taxing power] would be a violent assumption of power, unwarranted by any article or clause of its Constitution." (Tudor Pub. Co. version (1947) at p. 206).

Conclusion.

The California Appellate Court opinion is subject to review. It, nevertheless, shows that in the Court's opinion, the States have an obligation not to regulate foreign commerce in the same way that they may not regulate interstate commerce. On the other hand, a nondiscriminatory property tax is not regulatory. It provides funds for the many services provided by State and local governments which support the ability of the Appellants and all businessmen to engage in profit-making enterprises here.

To allege that only some fire and police protection should be supported by certain businesses does not help the Federal regulation of commerce. It casts upon foreign businesses of other types, and upon domestic businesses and residents, the burden of providing all of the other services provided to the Appellants and other businesses alike. Our Government has, for generations, been a leader in establishing equality for foreign enterprises and persons in this country. They deserve that equality. But to oblige our own businesses and residents to underwrite foreign enterprise ignores that

Government's obligation to treat its own people with the same impartiality which is a goal of our Judeo-Christian heritage as well as our Constitution.

Zee Toys recognizes that obligation.

Respectfully submitted,

John H. Larson,
County Counsel,

James Dexter Clark,
Deputy County Counsel,

Counsel for Appellees.

Service of the within and receipt of a copy thereof is hereby admitted this .... day of December, A.D. 1978.

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' REPLY BRIEF

Peter L. Briger, Esq.
BRIGER & ASSOCIATES
299 Park Avenue
New York, New York 10017
(212) 758-4000

Sheldon S. Cohen, Esq.,
COHEN & URETZ
1775 K Street, N.W.
Washington, D.C. 20006
(202) 293-4740

Reed M. Williams, Esq.,
Ronald L. Young, Esq.,
GRAHAM & JAMES
100 Oceangate, Suite 515
Long Beach, Calif. 90802
(213) 435-4435

Counsel for Appellants

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' REPLY BRIEF

I.

Restatement of Issue

The precise issue which this case presents is whether the fiction of *situs* through average presence, relied upon by Appellees, can, under the Constitution, be applied to Appellants' containers (foreign-owned instrumentalities used exclusively in foreign commerce) so as to create an actual presence sufficient to permit the valid assessment of a general local property tax. Regardless of the use of this test in connection with property owned by domestic persons, as sanctioned by this Court in *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U.S. 18 (1890), *and Braniff Airways,*

Inc. v. *Nebraska State Board,* 347 U.S. 590 (1943), it is not applicable in the instant situation where the United States has clearly stated that the imposition of such tax upon Appellants' containers constitutes an impermissible interference with its exclusive right to regulate foreign commerce in an area where the Nation must speak with one voice.

II.

The Tax as Imposed Constitutes an Improper Interference with the Foreign Relations of the United States.

The Brief for the United States clearly sets forth its interest to "develop and facilitate the use of containers in international commerce". Brief for the United States at 28. It is expressly stated therein that the imposition of the property tax in question "would frustrate accomplishment of the federal objective in allowing temporary free admission to the containers under bond" and "[lessen] the effectiveness of the federal regulation by burdening foreign-owned containers with a multiple tax burden that hinders the use of such containers in our foreign commerce." Brief for the United States at 28-29.

A concise summary of the current status of the effect of foreign policy considerations upon a related provision of the Constitution, the Import-Export Clause, is found in *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276 (1976) and *Department of Revenue* v. *Association of Washington Stevedoring Companies,* —— U.S. ——, 98 S. Ct. 1388 (1978). In the concurring opinion in *Washington Stevedoring Companies,* it was stated as follows:

> "In *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276 (1976) this Court abandoned the traditional formalistic

> methods of determining the validity of state levies under the Import-Export Clause and applied a functional analysis based on the exaction's relationship to the three policies that underlie the Clause: (i) preservation of uniform federal regulation of foreign relations; (ii) protection of federal revenue derived from imports; and (iii) maintenance of harmony among the inland States and the seaboard States. The nondiscriminatory *ad valorem* property tax in *Michelin* was held not to violate any of those policies, but the Court suggested that even a nondiscriminatory tax on goods merely in transit through the State might run afoul of the Import-Export Clause." 98 S. Ct. at 1405.

This is the situation which exists in the instant case. It can be remedied by the Court's invalidation of the "property tax" as applied to Appellants' containers.

In addition, and wholly aside from considerations of foreign policy under the Import-Export Clause referred to by the Court in the *Michelin* and *Washington Stevedoring Companies* cases, the adverse impact which the tax in issue creates upon the foreign relations of the United States clearly constitutes a violation of the Commerce and Supremacy Clauses of the Constitution.

Appellees argue that the fear of multiple tax burdens may not, in itself, constitute a proper constitutional concern. However, in the highly sensitive field of international transportation of goods and persons (traditionally subject to regulation and taxation upon a national governmental level, rather than a local governmental level), when the imposition of any such regulation, including the instant tax, directly and adversely affects the reliance interests of foreign governments, such a tax produces a serious and adverse effect upon the foreign relations of the United

States. This point has been confirmed by the Brief for the United States.

Moreover, angry and unreasoned polemics to the contrary notwithstanding, there must be reasonable limits upon the taxing powers of the States, under the Commerce, Supremacy, Treaty and Import-Export Clauses of the Constitution, when such taxing powers are exercised in a manner that produces adverse effects upon the foreign relations of the Nation. *See, Brown* v. *Maryland,* 25 U.S. (12 Wheat.) 448 (1827). It is not the role or function of state or local governments to determine what actions on the part of state and local governments may adversely impact upon the foreign relations of the United States.[1] The

[1] *See,* Hartman, *State Taxation of Interstate Commerce* 1 (1953), wherein the author commenced his treatise as follows:

> "That great jurist and pragmatist, Oliver Wendell Holmes, Jr., once wrote that while he did 'not think the United States would come to an end if we lost our power to declare an Act of Congress void,' he did 'think the Union would be imperiled if we could not make that declaration as to the laws of the several states.' [1] The reason Justice Holmes gave was that 'one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the commerce clause was meant to end.' He was thus expressing in vigorous and dramatic form the need for harmonious coordination of power between the national and state governments as a prerequisite for the functioning of our federal system. Implicit in Justice Holmes' idea that judicial review of state action is indispensable for the preservation of the federal system is the judicially recognized danger that encroachments by a State upon interests outside its borders are not likely to be curbed through political restraints.[2]
>
> [1] Holmes, Collected Legal Papers 295-96 (1920).
>
> [2] Marshall recognized this danger in McCulloch v. Maryland, 4 Wheat. 316, 435-36 (U.S. 1819). Justice Stone's thinking also embraced this idea. See Helvering v. Gerhardt, 304 U.S. 405, 412 (1938); South Carolina State Highway Dep't v. Barnwell Brothers, Inc., 303 U.S. 177, 185 n. 2 (1938). See Dowling, The Methods of Mr. Justice Stone in Constitutional Cases, 41 Col. L. Rev. 1160, 1171 (1941)."

Court has requested the Solicitor General to express the views of the United States on this question and he has done so. Apparently dissatisfied with the one voice with which the Nation has spoken on this question, Appellees and their *Amici* would arrogate to themselves the final say in what is to be considered a matter affecting the foreign relations of the Nation, within the meaning of that term from the standpoint of the Commerce, Supremacy, Treaty and Import-Export Clauses.

Appellees would have the Court believe that the pattern of Federal action and Federal interest in the area of regulation of international transport, as described in Appellants' Brief and the Brief of the United States, is not sufficient to pre-empt the area, and thus prohibit the imposition of a personal property tax on foreign-owned instrumentalities used exclusively in foreign commerce, based upon the fiction of average presence. Appellees argue that the only means by which such a result could be achieved is through the enactment of specific legislation by the Congress.[2]

There are numerous areas of exclusive Federal interest, particularly in the field of foreign relations, where the Executive Branch of the government may choose to operate pursuant to diplomatic channels, rather than on the

[2] For this proposition, they cite ***Moorman Manufacturing Co.*** v. *Bair,* —— U.S. ——, 98 S. Ct. 2340 (1978). The *Moorman* case did not involve any foreign policy matter, such as that involved here, in which the Federal government maintains overriding control. Rather, it involved the question of the allocation of tax solely of a domestic taxpayer among states. Moreover, the issue in that case had been considered by the Congress on a number of occasions without enactment of any specific legislative solution on this question. *See,* H.R. 11798, 89th Cong., 2d Sess. (1965); H.R. 16491, 89th Cong., 2d Sess. (1966); S. 317 92d Cong., 1st Sess. (1971); H.R. 1538, 92d Cong., 1st Sess. (1971); S. 1245, 93d Cong., 1st Sess. (1973); H.R. 977, 93d Cong., 1st Sess. (1973); S. 2080, 94th Cong., 1st Sess. (1975); and H.R. 9, 94th Cong., 1st Sess. (1975).

basis of a specific legislative scheme. *See, e.g.,* 22 U.S.C. §2656, which authorizes the Department of State to perform such duties respecting foreign affairs as the President of the United States shall direct without further action by Congress.

More particularly, Appellees' argument that the lack of specific legislative action precludes any Federal preemption is patently insupportable in that it disregards the established law on this question. The Court answered this point simply in *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 769 (1945) in the following terms:

> "For a hundred years it has been accepted constitutional doctrine that the Commerce Clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the Commerce Clause the final arbiter of the competing demands of state and national interests."

See, also, Gibbons v. *Ogden,* 22 U.S. (9 Wheat) 1, 187-198 (1824), where the Court stated: "[t]he power to regulate commerce with foreign nations is an express grant by the people to the Federal government"; *and Freeman* v. *Hewitt,* 239 U.S. 249, 252 (1946), where the Court stated: "[t]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States."

II.

Appellants' Containers Are Foreign Owned Instrumentalities Continuously in Transit in Connection with the Import and Export of Goods and Are Exempt from Property Tax under the Import-Export and Commerce Clauses.

The record clearly establishes that Appellants' containers, which are foreign owned instrumentalities of commerce, are continuously in transit and are used exclusively in the import or export of cargo in foreign commerce. It is settled law that the imposition of state or local tax upon property in transit in connection with the import or export of goods is invalid under both the Import-Export and Commerce Clauses. The following statement of Chief Justice Taney in the *License Cases,* 46 U.S. (5 How.) 505, 575-576 (1847), was cited with approval by the Court in both the *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U.S. 534, 540, n.6 (1959), and *Michelin,* 423 U.S. at 290, cases:

> "The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the State in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the State, but by citizens of other States, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu,* and on their way to the distant cities, villages, and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which

they were in truth imported. And a tax upon them while in this condition, for State purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a State."

As regards the invalidity of such a tax under the Commerce Clause, the Court in *Minnesota* v. *Blasius,* 290 U.S. 1 (1933), set forth the governing principles as follows:

> ". . . [t]he States may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a non-discriminatory property tax. Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulation. The 'crucial question,' in determining whether the State's taxing power may thus be exerted, is that of 'continuity of transit'. . . .
>
> * * *
>
> Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power." 290 U.S. at 9-10.

The Court in *Michelin* specifically recognized that even where a state non-discriminatory *ad valorem* property tax operated as no more than a transit fee upon property in

transit through the state, such tax would be invalid under both the Import-Export Clause and under traditional Commerce Clause analysis. *See, Michelin,* 423 U.S. at 290.

The tax imposed by Appellees in the instant situation operates as a tax on property in transit and is, therefore, invalid.

IV.

The "Average Presence" Test Is a Constitutionally Impermissible Basis upon Which to Impose Property Tax upon Foreign-Owned Instrumentalities Used Exclusively in Foreign Commerce.

The instant case is one of first impression for this Court in that it is the first time the Court has directly considered the constitutionality of the imposition of a general property tax upon foreign-owned instrumentalities, which pass through the relevant taxing jurisdictions only upon an "in transit" basis, as part of an international shipment. The taxation of such foreign-owned instruments of international traffic has traditionally been dealt with by the United States and its trading partners on the basis of reciprocal exemption, whether by means of the "Home Port" doctrine or any other applicable basis, such as pure reciprocity, as in the case of the Federal Republic of Germany. *See also,* 46 U.S.C. §§ 121, 141 and 142.

That the decision below represents the first time since the founding of the Nation in which the imposition of state or local property taxes have been sustained upon foreign-owned instrumentalities used exclusively in foreign commerce, strongly suggests that state and local governments have for nearly two hundred years recognized and accepted the applicability of the "Home Port" doctrine in regard to

foreign-owned instrumentalities. Appellees and their *Amicus*, the Multistate Tax Commission (the "MSTC"), question the existence of any such doctrine on the part of the United States. The Brief for the United States confirms, in the clearest of terms, the perception on the part of the United States and its trading partners regarding the adherence to such custom.[3] The failure on the part of state or local governments in the United States to levy any such tax for nearly two centuries eloquently testifies to the existence of such accepted custom on the part of state and local governments.

Appellees have relied heavily upon two decisions, *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1890), *and Canadian Pacific Railway Co.* v. *King County*, 90 Wash. 38, 155 P. 416 (1916), which they cite in support of the argument that foreign-owned containers, used exclusively in foreign commerce and passing through their jurisdictions only upon an "in transit" basis, are to be subject to the same treatment as foreign-owned rolling stock. The argument of Appellees on this point is insupportable for at least two reasons.

First, Appellees' analysis of the above two decisions is faulty in that neither case appears to have involved foreign-owned instrumentalities used exclusively in foreign commerce. In the *Pullman's Palace Car Co.* case, the entity subject to the capital stock tax was an Illinois corporation, rather than a foreign or non-U.S. person. Appellants recognize that the property of any domestic entity can be subject to an apportioned property tax by state or local governments on the basis of an assumed

[3] *See, Cooley* v. *Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 298, 311 (1851), in which the Court determined the imposition of pilotage fees by the Port of Philadelphia to be reasonable in view of the fact that commercial states and other countries imposed similar requirements.

average presence. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1890); *Braniff Airways, Inc.* v. *Nebraska State Board*, 347 U.S. 590 (1943); *and, Standard Oil Co.* v. *Peck*, 342 U.S. 382 (1952). Under the circumstances present in this case, however, where there is an established international practice of exempting foreign-owned instrumentalities used exclusively in international commerce, the imposition of the tax would, in the view of the United States, interfere with foreign policy and foreign relations of the Nation. *See*, Brief for the United States at 7, 14-32.

The *Canadian Pacific Railway Co.* case (which in any event does not constitute binding precedent upon this Court) would appear, on the basis of the scant facts reflected in the record, to have involved the imposition of property tax by the State of Washington upon property used in an intrastate activity. The rolling stock of the foreign railroad considered in that case appears to have been used between two points within the State of Washington.

The second major area in which Appellees' analogy of foreign-owned containers to foreign-owned rolling stock is invalid is that the supposition advanced by Appellees as to the treatment by state and local governments of foreign-owned rolling stock, appears to be totally incorrect. Appellants understand, on the basis of discussions with legal counsel and representatives of both domestic and foreign-owned railroads, that foreign-owned rolling stock, which enters the United States, is not, and has not been, subject to local property taxation. On the contrary, it is understood that the rolling stock of foreign railroads or car companies, which are made available to domestic railroads, upon a *per diem* or lease basis, are subject to property taxation, *the incidence of which falls entirely*

upon the domestic carrier, rather than upon the foreign owner.[4] Any such exemption afforded by the State of California with respect to domestic motor carriers which transport Appellants' containers, either from any motor vehicle registration tax (*See,* Appellees' Brief at 20) or from any *ad valorem* property tax, such as that which state and local governments (apparently including the State of California) impose on domestic railroads transporting foreign-owned rolling stock, can in no way be regarded as dispositive of this issue, imbued as it is with important foreign policy ramifications. Any such exemption that may be afforded must be considered a purely voluntary and gratuitous act on the part of the State of California.

It is submitted, moreover, that the application of the "Home Port" doctrine in the limited manner advocated by the Appellants and their *Amici* (other than the *Amicus* International Container Lessors Institute), *i.e.,* only in the case of unquestionably foreign-owned and foreign-domiciled instrumentalities, used exclusively in foreign commerce, would not deprive state and local governments of revenues designed to recoup the cost of any services reasonably allocable to the property in question.[5] There is no constitutional or other prohibition that would prevent Appellees from levying specific charges or taxes to

[4] It should be noted, moreover, that as regards Appellants' containers, no practice of interchangeability of the containers with other shipping companies exists or has been alleged to exist by Appellees. This situation is contrary to the practice which prevails in connection with railroad rolling stock.

[5] In this respect, Appellants note that the stipulation of facts between the parties to this litigation referred only to containers owned by Appellants. *See,* Appendix, p. 29-33. Appellants are contending exemption from the property taxes levied by Appellees only with respect to such containers owned by Appellants or leased from other residents of Japan.

enable them to recover the cost of services, which directly or indirectly in any reasonable manner, support the limited activities of Appellants in the Appellees' jurisdictions.[6] Moreover, the imposition of the tax upon this basis would not appear to present undue administrative problems for state and local governments.[7] In any event, the Court has held that administrative convenience cannot cure a constitutionally invalid regulation or requirement. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

[6] It should be noted that Appellants, in their petition for rehearing to the California Supreme Court, Jurisdictional Statement and Brief made reference to the benefits of police and fire protection purportedly provided by Appellees because those were the only services alleged by Appellees in their briefs before the courts below to have been provided to Appellants. Appellees in their brief filed with this Court attempt to insert into the record a host of other services, through innuendo, speculation or overstatement, which they now suggest were provided to the Appellants. It should be noted that Appellants maintained virtually no business or commercial presence within the jurisdictions of Appellees. In fact, the activities of four of the Appellants were conducted almost in their entirety through unrelated shipping agents. One of the Appellants, Japan Line, maintained a separate wholly-owned subsidiary to perform administrative services on its behalf. Three of the Appellants established a wholly-owned subsidiary, which as a separate entity was fully subjected to California property taxation upon its own property. Appellees in their brief improperly suggest that Appellants themselves maintained a large and highly trained work force that was benefitted by the variety of services provided by the Appellees. In this respect, Appellants actually maintained a minimal number of persons within the jurisdiction of Appellees. Crane operators and others alluded to by Appellees in their brief are employed by independent companies, which presumably are subjected to property taxation upon their own property.

[7] It is understood that the Washington State Department of Revenue has already adopted procedures of this type in that it has instructed its county assessors that the determination whether goods are moving in foreign commerce should now be made under the same "physical movement" test used to determine the taxability of goods moving in interstate commerce. Washington Department of Property Tax Bulletin, No. 76-2 (25 March 1976).

V.

In the Determination of the Validity of This Tax in the Instant Situation, the Economic Realities of the Tax Rather Than Formalisms or Fictions Are Controlling.

In the concurring opinion in the *Washington Stevedoring Companies* case, it was suggested that the Court, in considering the validity of a tax under the Import-Export Clause, should be guided by an analysis of the economic realities underlying the imposition of the tax, rather than by artificial distinctions or pure formalisms.[8] In this respect, the fact that the California legislature has enacted the tax in question as a general *ad valorem* property tax in no way validates the application of the tax in the instant case to foreign-owned instrumentalities used solely in the import and export of goods.

Appellees, in their brief, candidly concede that:

> "The property tax, based upon the value of the property continuously or regularly in the jurisdiction and apportioned so as not to fall on a use outside the jurisdiction, rests upon an entirely different basis. *It is not imposed, and cannot be imposed upon property having only a temporary presence.* The continuity of the presence and its duration must be substantial, creating by themselves the assurance that the property is receiving benefits of more general nature than those reimbursed by fee."
>
> [Emphasis Added.]
> Appellees' Brief at 17.

[8] None of the cases cited by Appellees or their *Amici* deal with the imposition of state or local property taxes upon instruments used exclusively in foreign commerce. Appellees assert that *Maine* v. *Grand Trunk Ry. of Canada*, 142 U.S. 217 (1891) *and Bass, Ratcliff & Gretton, Ltd.* v. *Tax Comm.*, 266 U.S. 271 (1924) grant local governments the authority to impose a tax such as that involved herein. However, each of the foregoing cases involved the imposition of a franchise or privilege tax upon a foreign entity, which was admittedly conducting intrastate business within the taxing jurisdiction. The cases cited by Appellees imposing property taxes on rolling stock, as discussed *supra* at pages 10 and 11 hereof, do not appear to have involved foreign-owned instruments of commerce engaged exclusively in foreign commerce.

It is Appellants' position that, since their containers do not have an actual presence in Appellees' jurisdiction, except through the fiction of an assumed average presence, the incidence of the tax levied by Appellants can be found to exist only as a result of the repeated importation of different containers, which Appellees have stipulated are "in constant transit". Since the containers lack an actual *situs* or fixed presence in Appellees' respective jurisdictions, it is the act of importation, upon a continuing basis, which is the basis of the imposition of the California property tax. Although such tax is denominated by the State of California as an *ad valorem* property tax, it is submitted that, under the particular circumstances present herein, involving foreign-owned containers, used exclusively in foreign commerce, the incidence of such tax occurs because of the repeated entry or import of such containers and the tax must be regarded as an improper impediment upon international transportation activities. In the determination of the constitutionality of a state tax, the Court will be governed by the practical effect of the tax, rather than the descriptive label applied by the state legislature. *Harvester Co.* v. *Dep't. of Treasury*, 322 U.S. 340, 346 (1944); *and, Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940).

Despite the denomination of the tax as a general property tax, in practical effect in the instant case, it operates as a tax on imports and exports. As such, the tax is contrary to the established policy of reciprocal exemption followed by the United States and its trading partners in the

regulation of such activities and violates the Supremacy, Treaty, Commerce and Import-Export Clauses of the Constitution.

VI.

Inaccuracies or Distortions in Appellees' Brief Must Be Corrected.

Appellants do not wish to dignify the speculation and attempts to create confusion by Appellees and their *Amicus*, MSTC. However, these inaccuracies should not remain uncorrected before this Court.

A. Japanese Tax Is Imposed upon Containers.

It should be noted that both the Appellees and their *Amicus*, MSTC, in an effort to obfuscate the nature, effect and, indeed, the existence of the Japanese property tax, cite a certain treatise on Japanese taxation for the years 1975-1976 and state that it makes no reference to the Japanese property tax to which the containers involved herein were subjected. *See*, Appellees Brief at 11 and Brief of *Amicus* MSTC at 32.

The conclusion of the Appellees and their *Amicus* is incorrect.[9] The text relied upon by Appellees and their *Amicus* makes it clear that Japan imposes a full *ad valorem* tax upon personal property the registered owner of which is listed in the fixed assets tax ledger maintained by the appropriate municipality in Japan. The tax is imposed

[9] It should also be noted that the *Amicus* MSTC in its brief asserts that containers are admitted without entry under 19 C.F.R. §10.41b(a). The proper provision which permits admission of containers into the United States without entry is 19 C.F.R. §10.41a (a)(1).

upon the full value of the property without any reduction or credit for any foreign taxes imposed.[10]

B. The Assumptions of Appellees and Its *Amicus* Distort the Facts of This Case

The attempts of Appellees and their *Amicus* to distort the meaning of stipulated facts in the record are equally ineffective. Appellees and their *Amicus* MSTC at various points in their briefs attempt to introduce speculation that Appellants' containers may have engaged in purely intrastate or interstate, rather than foreign commerce. On this point the stipulation of the parties is clear and provides as follows:

> "5. Said containers are used exclusively for the transportation of cargo for hire in foreign commerce.
>
> 6. Said containers are never used for intrastate or interstate transportation of cargo except as continuations of international voyages.
>
> 7. Interstate or intrastate movement of empty containers is solely for the purpose of picking up cargo to be carried in foreign commerce, or returning the containers to ports (principally Los Angeles), all containers thereafter moving by Plaintiffs' vessels to foreign countries.
>
> 8. All of the loaded containers physically present within Los Angeles County on the lien dates were loaded with cargo either inbound from or outbound to foreign ports.
>
> 9. All empty containers physically present within Los Angeles County on the lien dates were awaiting loading of cargo to be carried on Plaintiffs' vessels in for-

[10] See, Guide to Japanese Taxes 1975-1976, *Zaikei ShoHo Sha*, Tokyo, Japan, ¶30, which is reprinted at Appendix A.

eign commerce, or carriage to other ports (principally in Japan) by Plaintiffs' vessels." Appendix at 30.

Appellees have in this respect ignored the clearly stated stipulation which leaves no doubt that: (i) the containers herein were used solely in international commerce; and (ii) the containers were never used in interstate or intrastate commerce. As this Court has held, the parties to a lawsuit are entitled to litigate a case upon the assumption that stipulated facts will be taken as proved, *Hackfeld & Co.* v. *United States,* 197 U.S. 442, 447 (1905), and that such a stipulation will preclude inquiry into those facts. *Mumma* v. *The Potomac Co.,* 33 U.S. (8 Pet.) 281, 285-86 (1835) (Story, J.). The stipulated facts recited above are the facts upon which the lower court decided this case and upon which the parties have agreed to test the merits of their respective positions. They should not, and cannot, be altered at this point in the litigation either by Appellees, which agreed to the stipulation of those facts or by any *Amicus,* which was not a party to the stipulation.

It is clear from the foregoing that the Appellees and their *Amici* MSTC have attempted to distort the stipulated facts, notwithstanding their claims that Appellants have introduced into the record additional data and information. Any data or information submitted by Appellants involving subsequent developments, such as the imposition of Oregon property taxes on foreign-owned containers or the subsequent letters of protest filed by foreign governments, are not only admissible, but Appellants are, in fact, under a duty to present such information, pursuant to the admonition of Mr. Chief Justice Burger in his concurring opinion in *Fusari* v. *Steinberg,* 419 U.S. 379, 390 (1974). Other data introduced by Appellants in their Brief to this Court fall within the scope of published data permitted to

be introduced in *Quong Wing* v. *Kirkendall,* 223 U.S. 59, 64 (1912).[11]

C. The Containers Involved Herein Are Principally Maritime Instruments

Although it is apparent that the subject containers are multi-modal, it is submitted that the containers are fundamentally instruments of commerce that are an extension of the ships which carry them. Containers were invented and designed essentially as a means of maritime transportation, which could be transported overland as a continuation and integral part of such maritime transport. In fact, the authorities cited by *Amicus* MSTC clearly evidence the advent of containerization as a maritime and shipping development. *See,* Simon, *The Law of Shipping Contain-*

[11] Appellees have raised a question in their supplemental brief concerning the purported benefit derived by foreign shipping concerns by virtue of the Home Port doctrine. Appellees contend, on the basis of a decision rendered by an intermediate state appellate court, *Zee Toys, Inc.* v. *County of Los Angeles* and its companion case *Sears, Roebuck & Company* v. *County of Los Angeles,* 85 Cal.App.3d 763 (Cal. App. 1978), that the Commerce Clause requires states to treat domestic and foreign persons alike on the basis that any other treatment would constitute exercise of a power reserved to the Federal Government. The Appellate Court's decision is based upon an incorrect legal premise which this Court has already rejected in *J.E. Raley & Bros.* v. *Richardson,* 264 U.S. 157 (1924).

Moreover, the discrimination which Appellees allege to exist in favor of foreign-owned containers is nonexistent since Appellants' containers are subject to property taxation at a higher effective rate than are domestic owned containers. The approach advocated by Appellees would subject Appellants' containers to cumulative burdens not imposed upon local business, a " 'vice' characteristic of those taxes which have been held 'invalid' " by this Court. *See, Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 255 (1938). In the instant case, cumulative tax burdens are bound to occur because the United States has no mechanism to enforce the acceptance by foreign governments of the apportionment approach which the State of California is now urging upon them.

ers, 5 J. Maritime L. and Commerce 507 (1974).[12] Furthermore, the stipulation of facts expressly states that all of Appellants' vessels, on which the subject containers are carried, are specifically designed and constructed to accommodate the subject containers and carry only cargo in such containers. That containers are a development of maritime technology was recognized by the California Supreme Court in *Volkswagen Pacific, Inc.* v. *City of Los Angeles,* 496 P.2d 1237 (1972), where that court stated as follows:

> "Because the size of modern sea vans or 'containers' is dictated both by modern shipping technology and by the necessity of reducing the costs of shipping, the opening of such a container by an importer may not necessarily be 'for the sale or delivery of the separate parcels contained in it' (*F. May & Co.* v. *New Orleans, supra,* 178 U.S. at p. 508, 20 S. Ct. at p. 980), but may instead be accomplished so that the importer can by other means of transportation divert his imports to his outlets in different interior states."
>
> 496 P.2d at 1242.

Finally, the fact that the decision of the California Supreme Court in this case prompted the State of California to propose the extension of the property tax to foreign-

---

[12] The Authority relied upon by Appellees with respect to the nature of containers states as follows:

> "One of the most important technological developments in the transportation of goods by sea since steam replaced sail is the recent advent of the 'container revolution.'" Simon, *The Law of Shipping Containers,* 5 J. Maritime L. and Commerce 507 (1974).

Moreover, this source of authority further states that containers "[function] as ship's gear for cargo handling, and is usually provided by the carrier." *Id.* at 513. In this respect, it is interesting to note that much of the tratise authority cited by Appellees and *Amicus* MSTC regarding the nature of containers is found in the *Journal of Maritime Law and Commerce.*

owned aircraft used exclusively in foreign commerce is a further indication that the State of California regards the containers as equivalent to, or a part of, the vessel itself.

VII.
CONCLUSION

For the reasons stated herein, Appellants respectfully urge this Court to reverse the decision of the Court below and conclude that Appellants' containers are not subject to the imposition of personal property taxes levied by Appellees.

Respectfully submitted,

Peter L. Briger, Esq.
Briger & Associates
299 Park Avenue
New York, New York 10017
(212) 758-4000

Sheldon S. Cohen, Esq.,
Cohen & Uretz
1775 K Street, N.W.
Washington, D.C. 20006
(202) 293-4740

Reed M. Williams, Esq.,
Ronald L. Young, Esq.,
Graham & James
100 Oceangate, Suite 515
Long Beach, Calif. 90802
(213) 435-4435

Counsel for Appellants

APPENDIX A

APPENDIX A

30. *Fixed Assets Tax.* Fixed assets tax is paid by the registered owner of land, buildings, ships or any other kinds of depreciable assets as of January 1 of each year to a municipality (in exceptional cases, to a municipality and to a prefecture). "Registered owner" means the person registered as an owner of such property in a fixed assets tax ledger maintained by a municipality. This is not to be confused with the person who is registered as an owner in a real estate registration book maintained by a national juridical office for civil law purposes.

No fixed assets tax is levied on automobiles or other vehicles.

Land and buildings are taxed based on their value assessed by municipalities. Municipalities appraise the market value of land and buildings every three years. 1970 was the year of this appraisal. The basis for fixed assets tax used to be the same as the municipalities' appraised value. However, the increase in land price was so remarkably [sic] that taxpayer [sic] would be difficult to pay fixed assets tax based on market value of land. As the result, municipalities have adopted the assessment value which is different from the appraised value since 1964. . . .

• • •

With respect to the land for residential use, however, the assessment value is determined to be one-half of the appraised value for avoiding the heavy tax burden on the residential lands, and moreover the tax burden adjustment measures are maintained for 1973 and 1974. On the other hand, depreciable assets other than buildings are taxed based on the taxpayer's reported book value after depreciation deduction.

Appendix

The annual tax rate is 1.4%. In some relatively poor municipalities the tax rate is higher than 1.4%, but it may not be higher than 2.1% in any case.

Fixed assets tax is collected in April, July, December of the taxation year and February of the following year in four equal installments.

Some special concessions are granted in national law and in municipal statutes with regard to fixed assets tax.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-1378

JAPAN LINE, LTD., *et al.*,
Appellants,
v.
COUNTY OF LOS ANGELES, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE COUNCIL OF EUROPEAN AND JAPANESE NATIONAL SHIPOWNERS' ASSOCIATIONS

EDWARD A. MCDERMOTT
ALLEN R. SNYDER

HOGAN & HARTSON
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-4500

Attorneys for Amicus Curiae Council of European and Japanese National Shipowners' Associations

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF AMICUS CURIAE COUNCIL OF EUROPEAN AND JAPANESE NATIONAL SHIPOWNERS' ASSOCIATIONS

INTEREST OF AMICUS CURIAE

The Council of European and Japanese National Shipowners' Associations ("CENSA") is an international organization whose membership consists of the national shipowners' associations of the following countries: Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Italy, Japan, the Netherlands, Norway, Sweden and the United Kingdom, together with individ-

ual liner companies (including consortia) from those countries which trade to or from the United States.

CENSA was established in 1963 in order to provide a medium for consultation and cooperation on common problems affecting European and Japanese shipowners. The shipowners of the CENSA countries own over 50% of the world's merchant fleet, including almost 60% of the containers used in international shipping.

CENSA is filing this Amicus Curiae Brief because of its concern that the ruling below—by abrogating the home port doctrine presently followed by every major maritime nation in the world—will result in multiple taxation of foreign-owned container fleets and may cause unfortunate counter-measures by other nations and disruption of international trade relations.

CONSENT OF THE PARTIES

Amicus is filing this Brief with the consent of both parties, whose letters of consent have been filed with the Clerk.

ARGUMENT

I. THE DECISION BELOW UNJUSTIFIABLY ABROGATES THIS COURT'S HOME PORT DOCTRINE, WHICH HAS PROTECTED INTERNATIONAL COMMERCE FROM THE BURDENS OF MULTIPLE TAXATION AND INTERNATIONAL JURISDICTIONAL DISPUTES.

For more than one hundred years the United States, like every major maritime nation in the world, has followed the doctrine that an instrumentality of international commerce can be taxed only at its "home port." The California Supreme Court's decision under review here improperly abrogates this home port doctrine, in violation of federal constitutional principles and in disregard of the fundamental policy reasons for the establishment and continuation of the doctrine.

Appellants' Brief filed with this Court sets forth in detail the numerous constitutional infirmities of the decision below. Amicus CENSA adopts those legal arguments presented by Appellants and will not repeat them here. CENSA does wish, however, to add or emphasize a few key points which it believes are essential to an understanding of the continued necessity for the home port doctrine and the severe consequences that might follow from its repudiation.

The home port doctrine was first enunciated by this Court in *Hays* v. *Pacific Mail Steam-ship Co.*, 58 U.S. (17 How.) 596 (1854), striking down a property tax levied by the State of California on ocean-going steamships whose home port was outside that state. In *Hays* and its progeny the Court held that such a tax by a state on a vessel with a home port outside the state "is an interference with the commerce of the country not permitted to the States." *Morgan* v. *Parham*, 83 U.S. (16 Wall.) 471, 479 (1872). *See also Southern Pacific Co.* v. *Commonwealth of Kentucky*, 222 U.S. 63, 69 (1911) ("this court has declared and enforced the rule of taxability at the domicile of the owner of vessel property, when it did not appear that the vessels had an actual situs elsewhere").

The home port doctrine set forth in *Hays* serves several extremely important functions. First, it allows for taxation by the jurisdiction likely to have the most significant contacts with the vessel involved. Moreover, the doctrine provides an easily applied rule, with the beneficial result of minimizing international disputes over each country's taxing jurisdiction or the fairness of its taxing formula. Finally, adoption of the doctrine by all the major maritime nations has served to eliminate the dangers of multi-

ple taxation of the same property by different countries using inconsistent taxing systems.

The court below, however, has ruled that a state or municipality no longer must apply this salutary rule to international commerce, simply because a different rule is now used for American interstate commerce. The California court's application of interstate commerce principles to international trade is unsupportable as a matter both of constitutional law and of logic.

In *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), this Court ruled the home port doctrine inapplicable to interstate commerce, upholding the validity of an allocation, or apportionment, system for *ad valorem* property taxes on vessels serving inland waters. The *Ott* Court expressly refused to reach the question of whether a state constitutionally can apply such a system to "ocean carriage," or international commerce, as Appellees seek to do here. *See id.* at 173-74.

Similarly, in *Dep't of Revenue* v. *Ass'n of Washington Stevedoring Companies*, 98 S. Ct. 1388 (1978), this Court upheld application of a business and occupation tax on stevedoring, but only after emphasizing that "[n]o foreign business or vessel is taxed. [The taxpayers], therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States." *Id.* at 1401. Moreover, in *Michelin Tire Corp.* v. *Wages, Tax Comm'r*, 423 U.S. 276 (1976), the Court upheld a state property tax "on imported goods that are no longer in import transit," *id.* at 286, while noting that such a tax would not reach imports destined for inland states and using "transportation methods such as air freight *and containerized packaging*." *Id.* at 288 (emphasis added).

The distinction clearly emerges from these cases between interstate commerce—as to which an apportioned

tax is permissible—and international commerce—as to which the home port doctrine remains viable and thus no tax, apportioned or otherwise, can be levied on the vessel except at its home port. This distinction is a sound one that responds to practical realities as well as to constitutional principles. An apportioned tax is workable in the interstate commerce area because this Court is available to review any disputes between states or any contentions that different state apportionment formulas are inconsistent and would result in multiple taxation. However, as was recognized by the Superior Court judge in the decision reversed by the California appellate courts below, no such system for arbitration of apportionment disputes is available for international commerce (Jurisd. Statement, at 28a):

> To consider proration of taxes with foreign entities is not practical. There is no tribunal that can adjudicate these rights unless it be the International Court and to invoke its services jurisdiction must be consented to by all parties. For this reason, our Federal Courts have consistently held that vessels which are instrumentalities of foreign commerce and engaged in foreign commerce can be taxed in their home port only.

Moreover, it must be emphasized that so long as other nations continue to follow the internationally accepted home port doctrine, ships from those nations—which include all the CENSA members' countries—will automatically be subject to multiple taxation insofar as they utilize ports in a state, like California, following the apportioned tax system. The reason for this is that foreign-owned ships are taxed on their full value by their home port nations. If states are free to levy a tax based on the differing apportionment approach, neither the California courts nor even this Court would have the power to eliminate the resulting multiple taxation, which un-

fairly and illegally[1] would discriminate against ships and containers from foreign nations.[2]

It is important to note that international treaties and trade relationships also suggest the need for a different rule regarding states' tax powers over foreign, as opposed to interstate, commerce. It simply makes no sense for the United States government to be entering into solemn treaty obligations and agreements with foreign nations, while at the same time fifty individual states and all their municipalities would be free to tax foreign commerce from those nations in ways that might be (or be perceived as) inconsistent with the national government's obligations and agreements. Indeed, the Framers of the Constitution intended that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power . . . ." *Michelin Tire Corp.* v. *Wages, Tax Comm'r*, 423 U.S. 276, 285 (1976).[3]

[1] As is set forth in Appellants' Brief, such multiple taxation on foreign ships and containers, but not on U.S. vessels, would violate this country's treaty obligations, including those to CENSA member nations.

[2] If an apportionment system were utilized by all American states, U.S.-owned vessels logically could not be taxed on more than 100% of their assessed value; however, vessels serving the U.S., but based in countries continuing to follow the home port doctrine, would be taxed on more than 100% of value.

[3] *See Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 228-29 (1824) (Johnson, J. concurring) (emphasis in the original):

> Power to regulate *foreign commerce*, is given in the same words and in the same breath . . . with that over the commerce of the States. . . . But the power to regulate *foreign* commerce is necessarily exclusive. . . . Whatever regulations foreign commerce should be subjected to, in the ports of the Union, the general government would be held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity.

Even when acting within an area of traditional state jurisdiction, such as probate law, states are constitutionally required to avoid any interference with international relations. *See Zschernig* v. *Miller*, 389 U.S. 429, 440-41 (1968):

> It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. . . . The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. . . . Where [state] laws conflict with a treaty, they must bow to the superior federal policy. . . . The present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.

Thus, without regard to the rules that may be appropriate for the very different circumstances of interstate commerce, practical realities and constitutional principles demand continued application of the home port doctrine for international commerce.

II. IF ALLOWED TO STAND, THE DECISION BELOW WILL HAVE FAR-REACHING AND EXTREMELY DAMAGING EFFECTS ON INTERNATIONAL COMMERCE AND ON THE ECONOMIC INTERESTS OF THE UNITED STATES.

In ruling that a state or municipality is free to tax vessels or other instrumentalities of international commerce, the court below totally ignored the dangerous consequences of its unprecedented decision. This Court should reassert the applicability of the home port doctrine to such commerce in order to avoid the unfortunate possibility of foreign counter-measures and the disruption of

international trade which would flow from the decision below.

In assessing the impact of the lower court's ruling, it must be noted that far more is at stake than the few hundred thousand dollars of tax now being levied annually by these particular municipalities against these six Appellants in the instant case. The containerized shipping business, although relatively new, is an extremely large and growing form of worldwide trade. Amicus CENSA estimates that there currently are almost 2,000,000 twenty-foot equivalent units ("TEU")[4] of shipping containers used in world trade, with a current fair market value of approximately two billion dollars. In 1977, approximately 900,000 TEU's of foreign-owned containers were used in United States international commerce.[5]

If the California ruling were allowed to stand, it is reasonable to assume that most other states and municipalities would follow in seeking to increase their always-insufficient revenues through the politically attractive and lucrative means of taxing foreign-owned containers passing through their territory. One state, Oregon, has already announced it intends to join California in assessing such a tax; other states are sure to follow. Indeed,

[4] The "TEU," or twenty-foot equivalent unit, measure converts container volume into the equivalent number of standard, twenty-foot containers. Most shipping containers are either twenty feet or forty feet in length, approximately nine feet in height, and eight feet in width.

[5] CENSA estimates that the current fair market value, after depreciation, of these foreign-owned containers is $900,000,000. Applying the industry rule-of-thumb that such containers spend approximately one third of each year in their home port country or other overseas location, one third on the seas, and one third at some coastal or inland location in the United States, the application by all states of California's allocation system would result in a prorated fair market value of $300,000,000 worth of containers which U.S. States and municipalities would be free to tax.

under California's allocation system virtually any state or municipality in the Union could gain some advantage from such a tax, since containers are unloaded and shipped via truck and rail through and to almost all inland locations in this country. Thus, affirmance of the decision below would lead to a total state tax burden on containers amounting to many, many millions of dollars.

Moreover, the necessary implications of the decision below by no means are limited to containers. In rejecting the home port doctrine of *Hays* and its progeny, the California court has cleared the way for a similar allocated tax on every foreign-based ship and international passenger or freight airplane that arrives on its shores. The assessed value of all such vessels arriving in California alone is of staggering proportions. Moreover, as noted above, such a vast new source of tax revenue is unlikely to escape the attention of other states and municipalities. Affirmance here would allow every locality with an ocean port or an international airport to begin assessing and taxing on a pro rata basis every ocean vessel, each jumbo jet or freight airplane landing even briefly in its area, even though these ships and planes are owned, registered, based, *and taxed* in their home port countries. Since CENSA is aware of no maritime nation whose law provides a "credit" against home port property taxes for such taxes paid to another nation, the result would be multiple taxation of foreign-owned vessels. This would create an unfair advantage for U.S.-owned vessels in international commerce, in violation of the non-discrimination provisions of various international agreements entered into by the United States.

Even more significantly, CENSA believes that the decision below is likely to lead to counter-measures being taken against U.S.-owned vessels by this country's trading partners. It is simply unrealistic to assume that all the other nations which follow the home port doctrine will

sit by idly and watch their containers, ships and planes being subjected to multiple taxation by states or municipalities here, without taking any action in response—such as imposing their own taxes on United States vessels that land in their countries.[6]

As is indicated in Appellants' Brief, numerous foreign countries—including many of the CENSA members' nations—already have lodged formal protests with the United States Department of State against what they reasonably view as an unjust and discriminatory tax in violation of international law and agreements. The potential danger of "retaliation" by other countries and possible disruption of international trade was summarized well by the Federal Republic of Germany in its June 23, 1978, filing with the State Department, which focused especially on the effects on air transportation of California's allocation system:

> [A]part from the distortion of cost structures between airports the California tax example might induce other States to levy comparable taxes on foreign aircraft and eventually on other modes of international transportation as well. Retaliation by other countries might then subject international carriers to multiple taxation which would be clearly in contradiction to efforts to facilitate international Commerce.

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[6] Government figures indicate that there currently are 797,690 TEU's of containers owned by United States steamship and leasing companies and used in international commerce. CENSA estimates that the fair market value of these containers is approximately $798,000,000. Thus, other nations would be free to levy taxes on a pro-rated value of $266,000,000 worth of U.S. containers, *see* note 5, *supra*, and possibly even more if those nations do not limit themselves to the allocation formula adopted by California.

It is interesting to note, also, that worldwide abandonment of the home port doctrine would enable those U.S. trading partners who have no substantial merchant marine of their own to tax United States vessels without any reciprocal tax being recovered by this country.

Similarly, the Government of Japan in an Aide-Memoire to the State Department has cautioned that California's property tax on containers owned by foreign shipping lines constitutes double taxation and "impedes the smooth development of trade between the two countries." Jurisd. Statement, at 50a.[7]

Another indication of the possibility of foreign countermeasures against such a discriminatory United States tax arose at the June 12, 1978, meeting of the Council of European Communities. At that meeting, the Council adopted a resolution proposed by the European Economic Community (the "Common Market"), calling for concerted action by the Common Market countries "to decide suitable counter-measures against offending countries" that engaged in discrimination against "the maritime interests of Member States." [8]

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[7] Other countries that have lodged similar protests against California's action are: Canada, Denmark, Finland, France, Federal Republic of Germany, Japan, Mexico, the Netherlands, New Zealand, Norway, Sweden and the United Kingdom.

[8] *See* Minutes of 521st Council Meeting—Transport—Council of the European Communities, at 20-21 (June 12, 1978):

> ACTIVITIES OF CERTAIN NON-MEMBER COUNTRIES IN THE FIELD OF MARITIME TRADE
>
> In the light of difficulties observed as a result of the activity of certain third countries in the field of maritime trade the Council examined measures to be taken by the Community to counteract this trend. It recorded its agreement on a framework decision binding each Member State to take steps to set up a system by which to gather information on the activities of the fleets of countries whose practices are detrimental to the maritime interests of Member States, in particular insofar as these activities undermine the competitivity of Member States' fleets engaged in international maritime trade.
>
> To attain these goals each Member State must be able to obtain information on the level of services offered, the nature, volume, value, origin and destination of goods loaded and unloaded and on the rates charged for these services.

[Footnote continued on page 12]

A recent letter from the Office of the United States Special Representative for Trade Negotiations attests to the fact that CENSA's concern regarding possible countermeasures against United States ships and potential disruption of international trade is not mere speculation. As stated by the General Counsel of that Office, the California tax "may well constitute a non-tariff trade barrier" that will complicate current international negotiations, and "significant problems may arise on the part of the trading partners of the United States, not only with respect to containers, but also in other areas through retaliation and the imposition of similar types of levies." Jurisd. Statement, at 48a-49a.[9]

The Framers of the United States Constitution wisely prohibited individual states from levying tariffs or otherwise interfering in the regulation of foreign policy and trade. Fifty separate states, with their countless municipalities, cannot participate in international trade negotiations or develop appropriate reciprocal tax structures. Yet, under the ruling below, each would be able to levy taxes on a portion of this nation's foreign trade, raising the spectre of unfortunate responses and countermeasures by this country's foreign trading partners.

[8] [Continued]

The Council will decide on the countries to whose fleets the all-round Community system of information will apply.

On this point the Council instructed the Permanent Representatives Committee to work out in conjunction with the Commission measures for implementing these provisions, for adoption by the Council at its next transport meeting in November, bearing in mind the wishes expressed by delegations as regards the activities of State-trading countries and flag of convenience countries.

On the basis of the information gathered, the Council will be able to decide suitable counter-measures against offending countries. These will form part of national legislation, be applied in concert, and might include restrictions, depending on the circumstances.

One delegation gave its agreement subject to confirmation, and will make known its firm position at the earliest opportunity.

[9] Similarly, in a letter to Governor Jerry Brown, dated April 17, 1978, The Honorable Julius L. Katz, Assistant Secretary of State for Economic and Business Affairs, warned of "the likelihood of retaliatory taxation measures against U.S. citizens engaged in ocean commerce abroad" if California fails to change its current combiner tax policy.

Amicus CENSA respectfully submits that this Court should retain the home port doctrine—which has been so long and universally applied by the world's major maritime nations—so that individual states and localities will not become hopelessly and dangerously enmeshed in international trade and taxing disputes that surely would result in damage to the economic interests of the United States and all its trading partners.

CONCLUSION

For the foregoing reasons, Amicus CENSA urges this Court to adhere to the home port doctrine and to reverse the decision below.

Respectfully submitted,

EDWARD A. MCDERMOTT
ALLEN R. SNYDER

HOGAN & HARTSON
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-4500

Attorneys for Amicus Curiae Council of European and Japanese National Shipowners' Associations

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

—v.—

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF INSTITUTE OF INTERNATIONAL CONTAINER LESSORS, LTD., AS AMICUS CURIAE

EDWARD A. WOOLLEY
LAW FIRM OF MALCOLM A. HOFFMANN
12 East 41st Street
New York, New York 10017
(212) 685-0535
Attorney for Amicus Curiae

MICHAEL D. BARTELL
MARTIN D. GOODMAN
DENNIS J. KENNY
ROBERT M. RIGGS
JOSEPH LEWIS SIMON
Of Counsel

August 25, 1978

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No. 77-1378

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Appellants,

—v.—

County of Los Angeles; City of Los Angeles; and City of Long Beach,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF INSTITUTE OF INTERNATIONAL CONTAINER LESSORS, LTD., AS AMICUS CURIAE

The Institute of International Container Lessors, Ltd. ("IICL") submits this brief *amicus curiae* with the consent of the parties.[1] IICL, a Delaware corporation authorized to conduct activities and with principal offices in the City and State of New York, is the trade association for the international marine cargo container leasing industry.

[1] Copies of Appellants' and Appellees' letters of consent are submitted with the signature copy of this brief.

Interest of IICL

IICL's members lease marine cargo containers (hereafter generally "containers") to ship lines for use in the world-wide transportation of goods. Containers are now the principal means for marine transportation of manufactured products and also play an increasingly significant role in ocean transport of certain raw materials and agricultural products. The estimated world population of containers is approximately 2.1 million (measured in twenty foot equivalents or "TEU"). Nearly one-half of these are owned by leasing companies, and the remainder are owned by the ship lines themselves.[2]

IICL's membership consists of both foreign and United States leasing companies. Five of IICL's nine members are United States corporations; the other four are foreign corporations.[3] This appeal concerns imposition of a California local personal property tax on the containers of foreign owners. IICL's foreign members are concerned by the application of the tax to them, but IICL's United States members are even more concerned because of the threatened retaliation by foreign countries, if the tax is upheld. Such retaliation is expected to take the form of property taxes imposed exclusively on the containers of United States owners. IICL's members therefore have a direct and substantial interest in the subject matter of this appeal and in reversal of the court below.

[2] Approximately 700,000 TEU are owned by members of IICL; of these, approximately 455,000 are owned by United States members. Approximately 150,000 TEU are owned by other United States leasing companies, not members of IICL. United States leasing ownership is thus about 600,000 TEU. Total United States ownership, including both leasing companies and ship lines, is about 1,000,000 TEU. See page 5 and note 9 below. See also 12 *Containerisation International* 15 (No. 5, May 1978).

[3] A list of members is attached as Exhibit A.

ARGUMENT

I.

The Nature of the Container Industry, Shipping and Leasing, and the Magnitude of United States Interests at Stake.

Container shipping was begun in the late 1950's by Sea Land Service, Inc., a United States ship line which also appears in this appeal as *amicus curiae*. Container shipping did not begin in volume, however, until the middle or late 1960's. The world population of containers increased from approximately 250,000 TEU in 1968 to 2.1 million TEU in 1978, an increase of over 700%.

Containers are intermodal, that is to say, they can travel equally well by ship, on a chassis behind a tractor over the road, or on a railroad flat car. They are, nevertheless, unquestionably marine instruments. This is evidenced by the fact that container regulation and technology are dominated by marine bodies and concepts.[4] At least one leg of

[4] The United Nations body principally concerned with containers is the Inter-governmental Maritime Consultative Organization ("IMCO") through its Sub-committee on Containers and Cargoes. United States government bodies principally concerned with containers include the State Department Working Group on Containers and Multimodal Transport of the Subcommittee on Safety of Life at Sea of the Shipping Coordinating Committee, the Coast Guard, the Maritime Administration, the Customs Service, and the Federal Maritime Commission. The Coast Guard administers the International Convention on Safe Containers (CSC) on behalf of the United States. See *International Safe Containers Act: Hearings on H.R. 8159 Before the Subcommittee on Coast Guard and Navigation of the Committee on Merchant Marine & Fisheries*, 95th Cong., 1st Sess. 215-247 (1977). The recognized classification society for containers in the United States is the American Bureau of Shipping; the same role is performed in other countries by their maritime classification societies, e.g. Lloyds Register Industrial Services in the U.K.,

virtually every trip made by a container involves a sea voyage. Accordingly, it has become generally accepted that containers are part of the ship, either structurally or as part of the ship's gear. See *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 53 (2d Cir. 1976); *Leather's Best, Inc. v. SS Mormaclynx,* 451 F.2d 800, 815 (2d Cir. 1971); see also Rev. Rul. 60-185, 1960-1 C.B. 412; N.Y. Sales Tax Reg. §528.9 *Commercial Vessels.*

The modern containership is designed solely for the transport of goods by container, and container owners, both ship lines and leasing companies, jealously guard their containers' status as Instruments of International Traffic in order to avoid customs duty.[5] They can do this in the United States only by ensuring that all trips are part of a direct import or export move or are made to reposition for an export move.[6] Containers are not generally used for domestic commerce simply because it is less expensive to ship goods by ordinary tractor/trailer truck than by container, if a trip does not involve a sea voyage.[7]

Bureau Veritas in France. Other organizations performing similar functions in the United States include International Cargo Gear Bureau, Inc. and Marine Container Equipment Certification Corporation. See, e.g., 43 Fed. Reg. 26810 (June 22, 1978). The briefest glance at the trade literature is conclusive as to its marine nature. See, e.g., *Cargo Systems, Containerisation International, Container News, Jane's Freight Containers 1978* (10th Ed.).

[5] As a result containers generally never become "imports" and continue for the duration of their "lives" to make voyage after voyage and trip after trip without ever becoming subject to customs duty in any country.

[6] U. S. Customs Regulations, 19 C.F.R. §10.46a(f); see Customs Convention on Containers, May 18, 1956, [1969] 20 U.S.T. 301, T.I.A.S. No. 6634.

[7] A tiny percentage has been "domesticated" for use in interstate commerce (either by being manufactured in the United States or by payment of duty). Such use includes sea routes between the 48 contiguous states and Alaska, Hawaii and Puerto Rico.

Containers have been able to succeed as an international device for cargo transport because they are of standard sizes and specifications suitable for use in the transportation and handling equipment of many different nations. Perhaps 80% to 90% of the world's containers are built to the standard size and strength specifications of the International Organization for Standards in Geneva ("ISO"). ISO standard containers are generally 20 or 40 feet long, 8 feet wide and 8 or 8½ feet high.[8]

The United States interests in this industry are enormous. The United States container leasing industry alone owns approximately 600,000 TEU. When the 400,000 TEU owned by United States ship lines are added to the United States leasing ownership, total United States ownership reaches approximately 50% of the estimated world population of 2.1 million.[9] The replacement value of the 1,000,000 United States TEU is substantially in excess of $2,000,000,000,[10] and the five United States leasing com-

[8] International Standard ISO 1496/I, *Series I freight containers —Specification and Testing, Part I General Cargo Containers* (3d. Ed.—1978-04-01).

[9] The Maritime Administration of the U.S. Department of Commerce publishes statistics on American ownership annually. While these statistics do not show foreign ownership, the Maritime Administration's *Inventory of American Intermodal Equipment 1978,* shows that at the close of 1977, United States owners, both leasing companies and ship lines, held approximately 800,000 containers (TEU). These 1977 statistics excluded one major United States leasing company which held in excess of 50,000 TEU. Most owners had added substantial numbers of containers by the end of the first six months of 1978. United States leasing companies alone added approximately 100,000 containers.

[10] A trade publication cites prices for 20 foot standard steel containers as between $2,200 and $2,500 in Europe and $1,900 in the Far East (except for Japan where presumably the price is higher). 5 *Cargo Systems* 34, 35 (No. 5, May 1978). Containers built of other materials and specialized containers are more expensive than the standard steel container. Thus, the replacement value of the United States fleet of 1,000,000 TEU could be expected to be substantially above $2,000,000,000.

panies who are members of the IICL had annual gross revenues of approximately $250,000,000 in 1977. Since all or most of these revenues are collected in dollars, the leasing industry makes a substantial contribution to the United States balance of payments.

II.

The California Tax Threatens Serious Interference With United States Foreign Commerce and With Imports and Exports.

A. *The "Home Port" Doctrine.*

The history of the United States has been strongly affected by its role as a maritime trading nation. Early in the nation's existence, the Supreme Court developed principles of respect for each state's taxation and regulation of shipping in order to reflect the nature of ships as constantly moving instruments of commerce. Those principles were called the "home port" doctrine. *Hays* v. *The Pacific Mail Steam-ship Company,* 58 U.S. (17 How.) 596 (1855); *Morgan* v. *Parham,* 83 U.S. (16 Wall.) 471 (1872).

In rejecting application of a California property tax to a ship sailing out of the Port of New York, the *Hays* case held that under the "home port" doctrine, only the state of the domicile of the vessel, or the "home port," had jurisdiction to levy property taxes. A vessel acquired no permanent situs as property in any other state. The Court's language was even broader in asserting that the tax trespassed on the domain of the federal government (58 U.S. at 599):

> And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the States.

The "home port" doctrine is not only embodied in case law, but it has become codified in international tax treaties.[11] Moreover, the process of codification has extended the "home port" doctrine to containers. Bilateral tax treaties now being negotiated between the United States and other countries provide that the profits of an enterprise from the use, maintenance or rental of containers used in international traffic shall be taxable only in one of the two countries (e.g., Draft Convention for the Avoidance of Double Taxation, art. 8(3), United States-United Kingdom, *Treas. News,* Jan. 6, 1976 with text of Treaty signed December 31, 1975, now pending ratification). A concept of complete exclusion of ships from taxation has gained acceptance over the years, and numerous states have adopted provisions of constitutional or statute law prohibiting taxation of ships.[12]

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[11] For example, bilateral tax treaties commonly provide that an operator of ships and airplanes registered in the operator's country of residence, shall be exempt from tax in the other country. E.g., Convention for the Avoidance of Double Taxation With Respect to Taxes on Income, July 22, 1954, United States-Federal Republic of Germany, [1954] 5 U.S.T. 2768, T.I.A.S. No. 3133; Convention on Matters of Taxation With Related Letters, June 20, 1973, United States-Union of Soviet Socialist Republics, 27 U.S.T. 1, T.I.A.S. No. 8225.

[12] E.g., Calif. Const. art. 13, §3(1); N.Y. Tax Law §1115(a)(8) (McKinney 1965).

Containers have even less permanent situs in, and even fewer ties to, particular jurisdictions than do ships. They travel from country to country as Instruments of International Traffic and are as much subject to control by international convention as to control by the laws of any one country.[13] Leasing company containers are freely interchanged among the ships of virtually all the maritime nations of the world, and they spend most of their "lives" outside of the physical control of their owner.[14] Containers are of such transient nature that any system of allocating taxes other than by nationality of the owner has little rational basis. The "home port" doctrine would seem particularly applicable.

In recent years this Court does not seem to have dealt with taxation of vessels or maritime equipment such as containers. Some guidance, however, is provided by several cases considering state taxation of related matters under the foreign commerce and import and export provisions of the Constitution. In reviewing these cases, it should be kept in mind that the matters as to which taxation was approved were not instruments of foreign commerce, as are containers, but had, or had achieved, distinct ties to the taxing jurisdiction.

[13] See text above and notes 4-6.

[14] The International Convention for Safe Containers reflects the commercial reality of this lessor-lessee relationship by defining the lessee as the "owner" if the lease provides that the lessee is to exercise the owner's responsibility for maintenance and examination. International Convention for Safe Containers, Dec. 2, 1972, art. II(10), *Customs Convention on Containers, 1972 and International Convention for Safe Containers*, Senate Executive X, Senate Comm. on Foreign Relations, 93d Cong., 1st Sess. (Comm. Print Nov. 15, 1973) (enters into force for United States Jan. 3, 1979).

B. *The Foreign Commerce Clause.*

This Court has considered the foreign commerce clause[15] recently in *Department of Revenue v. Ass'n of Washington Stevedoring Companies*, 98 S. Ct. 1388 (1978); see also *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 290 n.11, 96 S. Ct. 535, 543 (1976). In the *Washington* case, the Court upheld application to stevedoring of a business and occupation tax of the State of Washington which excluded income attributable to interstate and foreign commerce. The Court upheld the tax on the grounds that it was only on the value of services performed within the state, was properly apportioned, did not discriminate against interstate commerce, avoided the threat of multiple burdens, and did not unfairly burden by exacting more than a just share from the interstate activity. 98 S. Ct. at 1397, 1398, 1399. As the Court later pointed out, "No foreign business or vessel is taxed." 98 S. Ct. at 1401.

Here, there is an obvious effort to tax an instrument of maritime transport and a part of the vessel itself. There is no shorebound business, part of which can be allocated to domestic and part to foreign commerce. Moreover, California made no effort to apportion. It deemed the number of containers in California on tax lien day to be representative of those there every day, but this is no different from taxing a ship in port on lien day as representative of the owner's fleet. Regardless of what the parties have stipulated, the number of containers in a state on tax lien day is arbitrary. The number of containers in any jurisdiction at one time will differ according to the season and the level of economic activity (see pp. 12-13 below). The danger of multiple burdens is also

[15] U.S. Const. art. I, §8, cl. 3.

evident in that lien dates differ in different states; and a given container, which, like a ship, is intended always to be under way, might in a single year turn out to be in several states on the tax lien day of each such state. Nor did California make any effort to eliminate interstate or foreign elements attributable to the commerce which it taxed. As containers are integral parts of the vessels in which they travel (see p. 4 above), restoration of full freedom to the commerce here involved requires rejection of the application of the California tax to all containers.

C. *The Import-Export Clause; the Export Clause.*

In *Department of Revenue* v. *Ass'n of Washington Stevedoring Companies,* 98 S. Ct. 1388 (1978), the Court also reaffirmed the new approach to the Import-Export Clause[16] and to the Export Clause[17] established two years earlier in *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276, 96 S. Ct. 535 (1976). In dealing with the Import-Export Clause, *Michelin* had abandoned the "original package" doctrine and instead analyzed whether the state tax offended any of three policies (98 S. Ct. at 1400-1401 quoting from 423 U.S. at 285-286, 96 S. Ct. at 540):

> The Framers of the Constitution thus sought to alleviate three main concerns . . . : the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to other States not situated as favorably geographically.

[16] U.S. Const. art. I, §10, cl. 2.

[17] U.S. Const. art. I, §9, cl. 5.

The California tax certainly offends one and probably two of these policy considerations. Few countries invoke property taxes on containers at all, and virtually none taxes the containers of foreign owners. As a result, the imposition of the California tax on the Japanese owned containers has brought protests from numerous nations and the prospect of automatic retaliation under the law of at least one (see p. 12 below). The California tax will, therefore, cause most serious interference with commercial relations with foreign governments. It clearly invades the "exclusive power" of the federal government "to speak with one voice when regulating commercial relations with foreign governments."

There is also a threat to harmony among the states, not so much arising out of imposition of a tax by a seaboard state as from the impact of retaliation upon citizens of other states. The citizens of these other states will suffer retaliation from foreign governments arising out of the California tax without having had a voice in determining the wisdom or desirability of that tax.

Department of Revenue v. *Ass'n of Washington Stevedoring Companies,* 98 S. Ct. 1388 (1978), also interprets the separate prohibition against federal taxation of exports. The Export Clause is based on the very two policies identified in *Michelin* which the California tax offends: preventing disruption of United States foreign policy and

avoiding friction among the states. Since the tax offends these two primary policies, which underly both clauses, it should be struck down, not only in regard to foreign owned containers, but also in regard to domestic owned containers. As a tax on a maritime instrument of foreign commerce, it goes beyond any state tax hitherto approved by this Court.

The threat to commercial relations with foreign governments warrants closer analysis. If California applies its property tax to foreign owned containers, retaliation by numerous foreign countries can be expected. These foreign countries include major trading partners of the United States, such as West Germany, the law of which mandates a retaliatory tax, and the United Kingdom, France, Japan, the Netherlands, Norway, Denmark, Finland and Mexico, which have protested application of the California tax in letters to the State Department. See Brief for Appellants.

California's tax will have a special competitive impact on United States leasing companies. It will be an impact of the type which economists describe as pro-cyclical because it increases during a recession and tends to aggravate recessionary effects upon the industry. Taxes imposed on containers while they are on lease to ship lines are generally passed on by the leasing company and borne by the lessee ship lines (see p. 13 below); but taxes imposed on off-lease containers must be borne by the leasing company. Currently, the United States leasing industry enjoys a high utilization factor. About 88% of its fleet was on lease during the first half of 1978. Only approximately 12% of its fleet was off-lease during that period. Thus, at that time the United States leasing industry

could have been compelled to pay property taxes, retaliatory or otherwise, on about 12% of its fleet.

The present state of world trade is, however, relatively healthy. When a recession next strikes the international economy, the utilization percentage will decline, and the current off-lease percentage of 12% could easily double. If the off-lease percentage were to double, the number of containers subject to retaliatory taxes borne by leasing companies would double, and the property taxes required to be paid by the United States leasing companies would double. Such a doubling of a non-recoverable expense would take place at the very time when the general effect of the recession would cause leasing revenues to drop and company profits to be low or non-existent. The pro-cyclical increase in retaliatory property taxation upon the leasing industry would thus be in the magnitude of 100%. A competitive penalty of this size could be expected to reflect itself further in a decline in revenues. A decline in revenues would have an effect on United States dollar payments and would have the usual multiplier effect on the industries with which the container leasing industry deals, suppliers, repairers, refurbishers, etc.

As stated above, ship line lessees normally pay any taxes on leased containers in their possession. These taxes would include property taxes, and such levies would result in severe competitive injury to United States flag steamship lines. These lines already suffer sufficient competitive disadvantages. United States leasing companies have achieved their position in world commerce, however, by leasing to foreign ship lines as well as to United States ship lines. It is anticipated that when retaliatory taxes are imposed on containers on lease to foreign ship lines, these taxes will be refunded (or application withheld)

because the containers are in the service of the foreign ship lines, but there is no guarantee that the taxes will be administered in this manner. If the United States leasing companies cannot obtain refunds or otherwise avoid these taxes on leases to foreign ship lines, the competitive penalty will be a most heavy one, regardless of the state of world trade. United States companies will be compelled to pass on the taxes in their charges to foreign ship lines as well. If these charges cause the rates of United States companies to be higher than those of their foreign counterparts, foreign ship lines will have a simple choice; they will simply lease from foreign leasing companies.

One of the reasons for the establishment of the federal government and the delegation to it of the powers hitherto possessed by the states over foreign policy and foreign commerce was that, under the Articles of Confederation, states had adopted their own taxes on imports and passed individual and conflicting regulations regarding foreign commerce. *Michelin Tire Corp.* v. *Wages,* 423 U.S. at 283, 96 S. Ct. at 539-540 (1976). Permitting California to impose a tax on containers which will cause retaliation by foreign countries will bring this country back to the conditions which prevailed before 1789. It was to establish a single foreign policy, economic as well as political, that the states delegated to the federal government their powers over these matters in 1789. The United States must "speak with one voice" to the world abroad. Its citizens cannot afford to have their policy dictated by a single, or even several, states of the Union. Taxation of the instruments of foreign commerce is a field in which federal power must claim exclusive control.

Conclusion

Wherefore, IICL, as *amicus curiae,* respectfully requests this Court to hold invalid the application of the California personal property tax (i) to all marine cargo containers as instruments of foreign commerce having no single situs or, in the alternative, (ii) to foreign owned containers.

Respectfully submitted,

Edward A. Woolley
Law Firm of Malcolm A. Hoffmann
12 East 41st Street
New York, New York 10017
(212) 685-0535
Attorney for Amicus Curiae

Michael D. Bartell
Martin D. Goodman
Dennis J. Kenny
Robert M. Riggs
Joseph Lewis Simon
Of Counsel

August 25, 1978

APPENDIX

EXHIBIT A

List of Members of IICL

CTI-Container Transport International, Inc.
445 Hamilton Avenue
White Plains, New York 10601, U.S.A.

Contrans Gesellschaft für Containerverkehr M.B.H.
2000 Hamburg 50
Bugdahnstrasse 5, Germany

Ideal Container di Alfonso Donati
16121 Genoa
via XX Settembre, 34-7, Italy

Integrated Container Service, Inc.
522 Fifth Avenue
New York, New York 10036, U.S.A.

Interpool, Limited
630 Fifth Avenue
New York, New York 10017, U.S.A.

Nippon International Container Services Co., Ltd.
World Trade Center Building
4-1, 2 Chome, Hamamatsu-cho
Minato-ku, Tokyo, Japan

Sea Containers Inc.
39 Park Street
London, W1, Y3HG, England

SSI Container Corporation
Two Embarcadero Center
San Francisco, Calif. 94111, U.S.A

Trans Ocean Leasing Corporation
114 Sansome Street
San Francisco, Calif. 94104, U.S.A.

In the

Supreme Court of the United States

October Term, 1977

No. 77-1378

Japan Line, Ltd.,
Kawasaki Kisen Kaisha, Ltd.,
Mitsui O.S.K. Lines, Ltd.,
Nippon Yusen Kaisha,
Showa Line, Ltd., and
Yamashita-Shinnihon Steamship Co., Ltd.,

Appellants,

—v.—

County of Los Angeles,
City of Los Angeles, and
City of Long Beach,

Appellees.

On Appeal from the Supreme Court
Of the State of California

**BRIEF OF SEA LAND SERVICE INC.,
AS AMICUS CURIAE**

James W. McGrath, Esq.
Sea Land Service Inc.
4th & Main Street
Winston-Salem, North Carolina
27102
(919) 748-4100

Attorney for Amicus Curiae

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1378

JAPAN LINE, LTD.,
KAWASAKI KISEN KAISHA, LTD.,
MITSUI O.S.K. LINES, LTD.,
NIPPON YUSEN KAISHA,
SHOWA LINE, LTD., and
YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

—v.—

COUNTY OF LOS ANGELES,
CITY OF LOS ANGELES, and
CITY OF LONG BEACH,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF OF SEA LAND SERVICE INC., AS AMICUS CURIAE

Question Presented

Whether the imposition of property tax under Section 201, 59 West's Ann. Codes 215 (1970), upon foreign-owned containers used exclusively in foreign commerce. is repug-

nant to various provisions of the Constitution of the United States (the "Constitution"), including Article I, Section 8, Clause 3; Article I, Section 10, Clauses 2 and 3; Article II, Section 2, Clause 2; and Article VI, Clause 2; as well as various treaty obligations of the United States, including the Customs Convention on Containers, 20 U.S.T. 301, T.I.A.S. 6634.

Interest of the *Amicus*

Sea Land Service Inc. (hereinafter referred to as the "*Amicus*") is a corporation established under the laws of the State of Delaware. It is a shipping company engaged in the international carriage of cargo throughout the world. It is the largest operator of containerized vessels in the world. At the present time, the vessels of the *Amicus* call at 130 ports in more than 56 countries.

The interest of the *Amicus* in submitting this brief arises from its concern that foreign governments should not be provoked by actions effectuated at a local governmental level to impose retaliatory taxes upon the property of United States-owned shipping companies. Such retaliatory taxes would be directed solely against United States-owned shipping companies because, if the decision of the California Supreme Court were allowed to stand, the United States would be the only nation in which property taxes would be levied upon foreign-owned instrumentalities used exclusively in foreign commerce. Under rules established by the various liner conferences which *Amicus* and other United States-owned shipping companies are members, they would be required to absorb the entire cost of such retaliatory taxes. This added cost would severely and adversely affect the operations of the United States merchant fleet in the last remaining area where, because

of an American technological development, *i.e.*, the container, it still enjoys some competitive advantage.

The *Amicus* has no interest in resurrecting the "Home Port" doctrine in the case of domestic owned instrumentalities used either in interstate or foreign commerce. The *Amicus* litigated and lost this issue, *Sea Land Services, Inc.* v. *County of Alameda*, 12 Cal. 3d 772, 117 Cal. Rptr. 448, 528 P.2d 56 (1974), and is paying local property taxes on its containers in various jurisdictions in the State of California.

However, *Amicus* is not prepared to acquiesce in actions that would cause its containers to become subject to a myriad of retaliatory foreign property taxes imposed not only upon a national, but also upon a local, basis. The *Amicus* is concerned solely with assuring the continued application of the "Home Port" doctrine by the Nation as a whole, including state and local governments, to foreign-owned instrumentalities used exclusively in foreign commerce so as to assure the continued reciprocal exemption that has traditionally been extended by foreign governments to United States-owned instrumentalities used in foreign commerce.

ARGUMENT

Unless the decision of the California Supreme Court in this case is reversed, the imposition of state and local property tax upon foreign owned instrumentalities used exclusively in foreign commerce will undoubtedly proliferate throughout the United States. The action that has already been taken in the brief period since the issuance of this decision (including: (i) the proposal by the California State Board of Equalization of March 13, 1978, to subject aircraft used exclusively in foreign commerce to

California property tax; (ii) the assessment by Multnomah County, Oregon, of property tax upon foreign-owned containers used exclusively in foreign commerce in August, 1978, following the issuance of an opinion dated January 31, 1978 of the Oregon Department of Justice, Tax Division, authorizing such action; and (iii) the adoption on June 12, 1978 by the European Economic Community Council (the "EEC") a resolution to study counter-measures to be taken by member states against adoption by non-member states of practices detrimental to the maritime interests of EEC members, clearly support this conclusion.

The probable effect of such taxes will be to provoke retaliatory taxation applied selectively and exclusively against United States-owned instrumentalities used in foreign commerce. This result has been suggested by the United States Department of State ("the State Department") in its letter dated April 17, 1978 to Governor Brown of California. It has been expressly referred to in several of 12 expressions of concern submitted by foreign governments to the State Department protesting the imposition of property tax upon foreign instrumentalities used exclusively in foreign commerce. The law of the Federal Republic of Germany ("West Germany") provides an exemption from property taxation upon foreign instrumentalities of commerce, provided that the country of the owner of such instrumentality provides a reciprocal exemption. Vermoegensteurgesetz ("VSTG") section 2, ¶3.*

* In addition to the foregoing, the Income Tax Treaty between Germany and the United States (5 U.S.T. 3081, T.I.A.S. 3360) has been interpreted by Germany as being applicable to containerization on a reciprocal basis. In a ruling issued by the Finance Minister of Lower Saxony on March 7, 1969, it was determined that containerization shipping activities constitute "operation of ships" and as such are exempt from income tax in Germany if the United States grants a reciprocal exemption. Sea Land has been advised that this interpretation would be applicable to the capital tax imposed in Germany.

That such retaliatory taxes would be applied selectively and exclusively against United States instrumentalities of commerce, such as containers or aircraft, clearly follows from the fact that, if the decision of the California Supreme Court is allowed to stand, the United States would constitute the only nation among its trading partners to sanction the imposition of such a tax.

Under the rules of the various liner conferences to which the *Amicus* Sea Land and other similarly situated United States shipping companies belong, they would be required to absorb any such retaliatory foreign property taxes since, without conference approval, they would not be permitted to increase their tariffs. Since the foreign members of the conference would not be subject to such retaliatory taxes, it is unlikely that the conferences would permit any increase in the schedule of tariffs to reflect such retaliatory taxes. The imposition of such retaliatory taxes upon the containers of United States shipping companies is likely to render them uncompetitive in one of the few maritime areas where the United States has been able to preserve a relatively strong competitive position.

In this respect, the *Amicus* retained the maritime consulting firm of Temple, Barker and Sloane, Inc., to prepare an analysis of the United States container traffic in oceanborne foreign commerce to permit a proper analysis of the impact on the United States merchant fleet of such retaliatory foreign property taxes. A copy of this report is annexed hereto at Attachment "A".

The analysis of United States container traffic in foreign trade reflects data which inevitably leads to the conclusion that the imposition of retaliatory taxes by the foreign governments, which sent letters of protest to the State Department, could severely affect and possibly paralyze container-

ized trade by the United States merchant fleet. Exhibit I of Attachment A describes the various regular trade routes used by United States flag container carriers. These routes are identified in Exhibit I of Attachment A by the following trade route numbers and route descriptions:

Route 5 (North Atlantic/United Kingdom and Eire);

Route 6 (North Atlantic / Scandinavia and Baltic Ports);

Route 7 (North Atlantic/Germany (North Sea));

Route 8 (North Atlantic/Netherlands and Belgium);

Route 9 (North Atlantic/France and North Spain);

Route 11 (South Atlantic/United Kingdom and Eire);

Route 12 (Atlantic/Far East);

Route 21 (Gulf/United Kingdom and Ireland, Continental Europe North of Portugal);

Route 22 (Gulf/Far East); and

Route 29 (Pacific/Far East).

It should be noted that each of the routes listed above includes countries which have protested the imposition of California property tax upon foreign-owned containers used exclusively in foreign commerce. Exhibit II of Attachment A indicates that these particular routes accounted for more than 77 percent of the aggregate United States container tonnage in 1977. It should be noted that these routes are containerized to the extent of over 90 percent.

Exhibit V to Attachment A contains a comparison of "U.S. Turntime" to "Foreign Turntime," i.e., the average time United States containers spend within the United States as compared to the time they spend in foreign coun-

tries. Based upon this analysis, the aggregate "foreign turntime" is 35.7 percent greater than their "U.S. turntime." Consequently, if foreign jurisdiction imposing retaliatory taxes adopted an "average presence" approach similar to that applied by the Appellee in this case, the containers of United States flag carriers would be considered present in such foreign jurisdictions for a period more than 35 percent greater than their "average presence" in the United States. In recessionary periods, when the average "turntimes" are extended, the exposure to foreign retaliatory property taxes would be increased. See, *Amicus* brief submitted by the Institute of International Container Lessors.

The imposition of such local property tax by California and other state and local governments will provide and precipitate foreign retaliatory property taxes. Such action will create a most inappropriate burden that will quickly dissipate hard won competitive advantages secured through American technology and efficiency.

The free passage of foreign instrumentalities of commerce through the borders of the international community of nations is a cornerstone of the foreign relations among the United States and its foreign treaty and trading parties. It constitutes an area where the interest of the Federal Government, representing the Nation as a whole, clearly outweighs and preempts the interest of State and local governments to impose a tax in these circumstances. Such a result certainly is proper in the present circumstances where the containers of foreign shipping companies, through a series of specific charges, imposed for wharfage, dockage and the like, must be considered as paying their own way.

In order to preserve the long-standing and universally accepted rule of reciprocal exemption of foreign-owned

instrumentalities used exclusively in foreign commerce and prevent the chaotic effects of selective retaliatory taxation aimed at United States maritime interests, the *Amicus* respectfully requests this Court to reaffirm the "home port" doctrine enunciated in *Hays v. Pacific Mail Shipping Co.*, 58 U.S. (17 How.) 596 (1855), as the governing rule to be followed in the case of foreign instrumentalities used exclusively in international commerce.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the decision of the California Supreme Court should be reversed.

Respectfully submitted,

James W. McGrath, Esq.
Sea Land Service Inc.
4th & Main Street
Winston-Salem, North Carolina 27102
(919) 748-4100
Attorney for Amicus Curiae

Attachment "A"

I. Introduction

Temple, Barker and Sloane, Inc. was engaged on behalf of Sea Land Service Inc. to conduct a study of U.S. container traffic in oceanborne foreign commerce. The objectives of the study were:

- To determine the daily average number of U.S. owned containers situated in foreign countries based on a one-year period; and,
- To determine the average amount of time a U.S. owned container spends in foreign countries during a one-year period.

The results of the study and the methodology employed are described in the following sections.

II. Findings

TBS analyzed 1977 U.S. flag liner carriage to develop reasonable, albeit conservative, estimates of the daily average number of U.S. owned containers situated in foreign countries during 1977 and the amount of time each U.S. owned container spent in foreign countries during 1977. The results of this analysis are:

- Daily average number of U.S. Containers in Foreign Countries, 1977 — 29,374 Units

  By Equipment Type (based on 1977 ownership levels)

D-40	9,534 Units
D-35	7,850 Units
D-20	6,357 Units
Other	5,633 Units

- Average amount of time a U.S. Container spent in Foreign Countries, 1977 85.7 Days

  Percentage of time in foreign countries 23.5%

Because of the lack of reliable current information on container traffic, these estimates were derived from methodologies which employed a number of critical assumptions. In developing the assumptions, TBS utilized the latest information available, and relied heavily on the current experience of U.S. flag container carriers. The assumptions were designed to yield conservatively low levels of U.S. container activity, and, in fact, establish a world-wide requirement for U.S. containers which is 22,706 units (15.4%) less than the total number of units inventoried by U.S. flag container carriers during 1977. The conservatism of these estimates is further supported by the fact that they do not include any containers owned by U.S. leasing companies which are leased to foreign flag container carriers.

III. Methodology

In order to satisfy the objectives of this study, it was first necessary to establish the level of U.S. container traffic in foreign trade. The latest published data on U.S. flag container traffic are for calendar year 1974. These data do not accurately reflect current U.S. container carriage. Therefore, TBS developed a methodology for estimating U.S. container carriage during calendar year 1977, as well as the methodologies required to determine the number of U.S. containers in foreign countries and the amount of time they spend in foreign countries. Each of the methodologies including the base assumptions, is described in the following subsections.

A. U.S. Container Traffic In Foreign Trade, 1977

All U.S. flag container carriers operate in liner services. TBS reviewed published itineraries of all U.S. flag carriers and determined the trade routes served by each carrier. The total U.S. liner tons carried on each trade route, both inbound and outbound, were developed from Marad Liner Statistics for 1977 (001 Reports). To determine the liner tons carried in containers, TBS developed vessel profiles by operator and type for each trade route. Using this information, the 1974 *Containerized Cargo Statistics* published by Marad, and a TBS analysis of U.S. Flag Liner Service Commodity Carriage and Distribution prepared for Marad, TBS developed estimates of the percentage of liner carriage in containers on each trade route. These percentages were applied to the total liner tons carried in the dominant direction on each trade route to determine the total liner tons carried by containers in the dominant direction on each trade route (Exhibit II).

Exhibit I

Description of Trade Routes Analyzed For Container Traffic

Trade Route Number	*Description*
1	Atlantic/East Coast South America
2	Atlantic/West Coast South America
5	North Atlantic/United Kingdom and Eire
6	North Atlantic/Scandinavia and Baltic Ports
7	North Atlantic/Germany (North Sea)
8	North Atlantic/Netherlands and Belgium

Trade Route Number	Description
9	North Atlantic/France and North Spain
10	North Atlantic/Mediterranean, Black Sea and Portugal
11	South Atlantic/United Kingdom and Eire
12	Atlantic/Far East
13	South Atlantic and Gulf/Mediterranean, Black Sea, and Portugal
16	Atlantic, Gulf/Australasia
18	Atlantic, Gulf/India, Persian Gulf, Red Sea, Pakistan, and Burma
20	Gulf/East Coast South America
21	Gulf/United Kingdom and Ireland, Continental Europe North of Portugal
22	Gulf/Far East
24	U.S. Pacific/East Coast South America
25	Pacific/West Coast South America, Central America and Mexico
27	Pacific/Australasia
28	Pacific/Burma, Sri Lanka, India, Pakistan, Persian Gulf, Gulf of Aden, Red Sea, Bangladesh
29	Pacific/Far East
41	Atlantic/West Africa
42	Gulf/West Africa
51	Atlantic/South and East Africa
52	Gulf/South and East Africa

Exhibit II

U.S. CONTAINER CARRIAGE BY TRADE ROUTE
DOMINANT DIRECTION RELATIVE TO U.S.

1977

Trade Route	Direction	Liner Tonnage	Percentage Containerized	Container Tons
1	IN	245183.	.35	85814.
2	IN	141345.	.10	14135.
5	IN	237033.	.99	234663.
6	IN	105856.	.99	104797.
7	IN	235962.	.99	233602.
8	OUT	404631.	.99	400585.
9	IN	145393.	.99	143939.
10	IN	500241.	.65	325157.
11	OUT	204925.	.85	174186.
12	IN	435815.	.65	283280.
13	OUT	482652.	.30	144796.
16	IN	122287.	1.00	122287.
18	OUT	680098.	.20	136020.
20	OUT	116664.	.15	17500.
21	OUT	940020.	.65	611013.
22	IN	177041.	.10	17704
24	IN	42518.	.10	4252.
25	OUT	88787.	.10	8879.
27	OUT	99957.	.30	29987.
28	OUT	167879.	.75	125909.
29	IN	1668622.	.95	1585191.
41	IN	59229.	.10	5923.
42	OUT	159096.	.10	15910.
51	IN	167997.	.15	25200.
52	OUT	102826.	.10	10283.

To determine the number of container moves in the dominant direction on each trade route, TBS developed Unit Load Factors (tons per container) for the dominant direction of each trade route. These Load Factors are based on information obtained from U.S. flag container carriers, analysis of container density factors in appropriate Marad subsidy hearings, and analysis of container statistics from *Containerization International Yearbook 1978*. Container tons were divided by the load factor to yield the number of U.S. container moves in the dominant direction on each trade route during 1977 (Exhibit III). The dominant direction container moves on each trade route were aggregated to determine the total U.S. container moves in foreign trade for 1977.

The formulas for the calculation of U.S. container traffic in foreign trade are the following:

1. Liner Tons x % Containerized = Container Tons
2. Container Tons ÷ Unit Load Factor = Annual Container Moves

B. Daily Average Number of U.S. Containers in Foreign Countries During 1977

To determine the daily average number of U.S. Containers in foreign countries, TBS developed foreign turntimes—the amount of time each container moved spends in the foreign country while completing the move—for each trade route. For trade routes which include several countries with high container traffic volumes, TBS developed the weighted-average container turntime based on the container volume and turntime associated with each country on the trade route. The turntimes for foreign countries which TBS used to develop the trade route turntimes are based upon the actual experience of U.S. flag container

Exhibit III

U.S. CONTAINER CARRIAGE BY TRADE ROUTE
DOMINANT DIRECTION RELATIVE TO U.S.

Trade Route	Direction	Container Tons	Tons Per Unit	Container Moves
1	IN	85814.	11.	7801.
2	IN	14135.	11.	1285.
5	IN	234663.	7.	33523.
6	IN	104797.	8.	13100.
7	IN	233602.	9.	25956.
8	OUT	400585.	7.	57226.
9	IN	143939.	8.	17992.
10	IN	325157.	9.	36129.
11	OUT	174186.	9.	19354.
12	IN	283280.	9.	31476.
13	OUT	144796.	11.	13163.
14	IN	122287.	8.	15286.
18	OUT	136020.	12.	11335.
20	OUT	17500.	11.	1591.
21	OUT	611013.	11.	55547.
22	IN	17704.	8.	2213.
24	IN	4252.	11.	387.
25	OUT	8879.	1.	8879.
27	OUT	29987.	8.	3748.
28	OUT	125909.	12.	10492.
29	IN	1585191.	8.	198149.
41	IN	5323.	12.	444.
42	OUT	15910.	12.	1326.
51	IN	25200.	12.	2100.
52	OUT	10283.	11.	935.

TOTAL US CONTAINER MOVES IN FOREIGN TRADE 4861012

operators. The foreign turntimes for each trade route were multiplied by the number of dominant direction container moves on the trade route to obtain the number of container days spent in foreign countries. The container days were divided by 365 days to yield the daily average number of U.S. containers in the foreign countries on the trade route. These were then aggregated to provide the world-wide daily average number of U.S. containers in foreign countries during 1977 (Exhibit IV).

The formulas for the calculations of the daily average number of containers in foreign countries are as follows:

1. Container Moves x Foreign Turntime = Container Days
2. Container Days ÷ 365 Days = Daily Av. Number of Containers in Foreign Countries

C. Average Amount of Time U.S. Container Spent in Foreign Countries During 1977

TBS developed an estimated container cycle time for each trade route. The cycle time defines the amount of time required for one container to make a complete operating cycle (round trip) on the trade route. It is comprised of three components:

- U.S. Turntime—the amount of time the container spends in U.S. during one cycle;
- Voyage Time—the amount of time the container spends on the vessel during one cycle;
- Foreign Turntime—the amount of time the container spends in a foreign country during one cycle.

The TBS estimates of each of these components were based on the current experience of U.S. flag containership operators.

Exhibit IV

DAILY AVERAGE NUMBER OF U.S. CONTAINERS IN FOREIGN COUNTRIES BY TRADE ROUTE

(1977)

Trade Route	Container Moves	Foreign Turntime	Container Days	Daily Average Number of Containers
1	7801.	37.	288637.0	791.
2	1295.	42.	53970.0	148.
5	33523.	16.	536368.0	1470.
6	13100.	18.	235800.0	646.
7	25956.	21.	545076.0	1493.
8	57226.	14.	801164.0	2195.
9	17992.	18.	323856.0	887.
10	36129.	28.	1011612.0	2772.
11	19354.	16.	309664.0	848.
12	31476.	16.	503616.0	1380.
13	13163.	28.	368564.0	1010.
15	15286.	30.	458580.0	1256.
18	11335.	21.	238035.0	652.
20	1591.	37.	58867.0	161.
21	55547.	21.	1166487.0	3196.
22	2213.	16.	35408.0	97.
24	387.	37.	14319.0	39.
25	8879.	42.	372918.0	1022.
27	3748.	30.	112440.0	308.
28	10492.	28.	293776.0	805.
29	198149.	14.	2774086.0	7600.
41	494.	45.	22230.0	61.
42	1326.	45.	59670.0	163.
51	2100.	45.	94500.0	259.
52	935.	45.	42075.0	115.

TOTAL DAILY AVERAGE NUMBER OF U.S.CONTAINERS IN FOREIGN COUNTRIES 29374

The cycle time for each trade route was divided into 365 days to determine the number of cycles each container could make during one year (Exhibit V). The number of cycles developed for each trade was divided into the number of container moves in the dominant direction to determine the total number of containers required to support the system. The total number of containers was then divided into the total number of container days spent in foreign countries on the trade route to yield the number of days each U.S. container spent in foreign countries on the trade route during 1977. To determine the world-wide value, the total container days in foreign countries for all trade routes was divided by the total number of U.S. containers required on all trade routes (Exhibit VI).

The formulas for calculating the time a U.S. container spent in foreign countries in 1977 are as follows:

1. $\dfrac{(\text{U.S. Turntime} + \text{Voyage Time} + \text{Foreign Turntime})}{365} = \text{Cycles}$
2. Container Moves ÷ Cycles = Containers Required.
3. Container Days in Foreign Countries ÷ Containers Required = Days U.S. Containers Spent in Foreign Countries

Exhibit V

ESTIMATED CONTAINER CYCLE TIME
BY TRADE ROUTE

1977

Trade Route	U.S. Turntime	Transit Voyage Time	Foreign Turntime	Number of Cycles
1	23.	42.	37.	3.5
[illegible]	23.	49.	42.	3.2
[illegible]	23.	28.	16.	5.4
[illegible]	23.	35.	18.	4.8
[illegible]	23.	28.	21.	5.1
[illegible]	23.	28.	14.	5.6
[illegible]	23.	28.	18.	5.3
10	23.	49.	28.	3.7
11	23.	35.	15.	4.9
12	2[illegible].	56.	16.	3.8
13	17.	42.	23.	4.2
14	19.	43.	30.	3.9
[illegible]	19.	34.	21.	2.9
20	17.	42.	37.	3.8
21	17.	35.	21.	5.0
22	[illegible]	63.	16.	3.3
[illegible]	21.	56.	37.	3.2
[illegible]	21.	42.	42.	3.5
[illegible]	21.	56.	30.	3.4
[illegible]	21.	63.	28.	3.3
[illegible]	23.	38.	14.	4.9
41	23.	56.	45.	2.9
42	17.	56.	45.	3.1
51	21.	70.	45.	2.5
52	17.	70.	45.	2.8

Exhibit VI

AVERAGE TIME U.S. CONTAINER SPENT
IN FOREIGN COUNTRIES BY TRADE ROUTE

1977

Trade Route	Container Moves	Cycle Time	Containers	Container Days	Average Time Foreign Countries (days)
1	7801.	3.6	2167.	288637.0	133.2
2	1285.	3.2	402.	53970.0	134.3
5	33523.	5.4	6208.	536368.0	86.4
6	13100.	4.8	2729.	235800.0	86.4
7	25956.	5.1	5089.	545076.0	107.1
8	57226.	5.6	10219.	801164.0	78.4
9	17992.	5.3	3395.	323856.0	95.4
10	36129.	3.7	9765.	1011612.0	103.6
11	19354.	4.9	3950.	309664.0	78.4
12	31476.	3.8	8283.	503616.0	60.8
13	13163.	4.2	3134.	368564.0	117.6
16	15286.	3.3	4632.	458580.0	99.0
18	11335.	2.9	3909.	238035.0	60.9
20	1591.	3.8	419.	58867.0	140.5
21	55547.	5.0	11109.	1166487.0	105.0
22	2213.	3.8	582.	35408.0	60.8
24	387.	3.2	121.	14319.0	118.3
25	8879.	3.5	2537.	372918.0	147.0
27	3748.	3.4	1102.	112440.0	102.0
28	10492.	3.3	3179.	293776.0	92.4
29	198149.	4.9	40439.	2774086.0	68.6
41	494.	2.9	170.	22230.0	130.8
42	1326.	3.1	428.	59670.0	139.4
51	2100.	2.6	808.	94500.0	117.0
52	935.	2.8	334.	42075.0	126.0

Total Average Time in Foreign Countries 85.7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1378

JAPAN LINE, LTD., *et al., Appellants*

v.

COUNTY OF LOS ANGELES, *et al., Appellees*

On Appeal from the Supreme Court of California

BRIEF AMICUS CURIAE OF THE AIR TRANSPORT ASSOCIATION OF AMERICA ON BEHALF OF:

AIR NEW ENGLAND, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INC., CONTINENTAL AIR LINES, INC., EASTERN AIR LINES, INC., THE FLYING TIGER LINE, INC., FRONTIER AIRLINES, INC., HUGHES AIRWEST, NATIONAL AIRLINES, INC., OZARK AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, TRANS WORLD AIRLINES, INC., WESTERN AIRLINES, INC.

Attorneys for Amicus Curiae

GEORGE S. LAPHAM, JR.
JAMES E. LANDRY
KATHLEEN O. ARGIROPOULOS
1709 New York Avenue, N.W.
Washington, D. C. 20006
(202) 872-4164

August 28, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

COMES NOW, the

Air Transport Association of America on behalf of Air New England, Inc., Allegheny Airlines, Inc., American Airlines, Inc., Braniff Airways, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hughes Airwest, National Airlines, Inc., Ozark Air Lines, Inc., Pan American World Airways, Inc., Piedmont Aviation, Trans World Airlines, Inc., and Western Air Lines, Inc., pursuant to Rule 42 of this Court, and hereby respectfully files the attached brief *amicus curiae* on behalf of Appellants, Japan Lines, Ltd., *et al*.

Written consent to the filing of such brief has been received from both parties. Copies of their consents have been filed with the Court.

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TABLE OF CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 77-1378

JAPAN LINE, LTD., et al., Appellants

v.

COUNTY OF LOS ANGELES, et al., Appellees

BRIEF AMICUS CURIAE OF THE
AIR TRANSPORT ASSOCIATION OF AMERICA

INTEREST OF AMICUS CURIAE

The air carriers filing this brief, *amicus curiae*, are all U.S. airlines who provide regularly-scheduled air transportation services to members of the traveling and shipping public. Each is vitally concerned that the California *ad valorem* property tax on foreign-owned instrumentalities of foreign commerce, specifically,

cargo containers, be recognized as an unconstitutional exercise of the state's taxing authority. Endorsement by the Supreme Court of such a tax is viewed as guaranteeing attempts at expanding state taxation to foreign-owned aircraft operating solely in foreign commerce.

Taxation of this nature runs afoul of the U.S. Constitution. Yet, citing the California Supreme Court's decision in the instant case as establishment of authority, the California State Board of Equalization has proposed to amend its property tax regulations so as to impose ad valorem taxes on foreign aircraft which land in the state during the course of their journeys in foreign commerce. While the Board has postponed its consideration of the proposed tax, pending review of this case by the Court, it is anticipated that Court approval of the tax on cargo containers

will trigger imposition of the state tax on foreign aircraft. And other states are likely to follow California's lead.

Since U.S. air carriers operating in California are already taxed on those aircraft having an intermittent situs within the state, and use U.S.-owned cargo containers in their freight operations, the proposed action by the State Board of Equalization will have no direct impact on them. Thus, their interest in this proceeding may appear tangential. This is not the case. The carriers believe the imposition of a tax on foreign-owned instrumentalities of foreign commerce is impermissible under the Constitution. They also believe that such taxation here will prompt foreign governments to impose similar charges on U.S.-owned instrumentalities which cross their borders in the course of foreign commerce. This very

real possibility will have a direct financial effect on the current and future operations of the U.S. air carriers, filing as amicus curiae, who serve foreign points, including transborder points in Canada and Mexico. It can be anticipated that every foreign government, whose businesses have been taxed in any one of the fifty U.S. states, will seek to offset the competitive costs to their nationals by imposing similar charges on U.S. instrumentalities of commerce. This will have a pronounced and spiralling impact on the U.S. air carriers.

Due to the reasonable expectation of such reciprocal charges by foreign governments and the belief that state attempts to tax instrumentalities of foreign commerce is impermissible under the Constitution, the carriers, filing as amici curiae, have a substantial interest in this proceeding. Their participation, it is asserted, will

also assist the Court by emphasizing the ramifications of this decision on other U.S. instrumentalities of foreign commerce.

ARGUMENT

I. A STATE MAY NOT IMPOSE AN AD VALOREM PROPERTY TAX ON INSTRUMENTALITIES ENGAGED IN FOREIGN COMMERCE WITHOUT VIOLATING THE COMMERCE CLAUSE OF THE CONSTITUTION

Article I, section 8, clause 3 of the United States Constitution grants to the government of the United States "the power to regulate commerce with foreign Nations, and among the several states..." By ratification of this clause, the states surrendered their power over foreign, as well as interstate commerce.

The drafters of the Constitution, being responsive to the peoples' desires for independence, fashioned a federalism which retained with the states and/or the people vast amounts of power. In certain areas,

however, the drafters recognized the need for central control. One such area was the regulation of commerce. The ratification of the Constitution by the states endorsed this principle and, thereby, the powers of the respective states in this area were surrendered. A presumed explanation of this surrender is its logic when viewed against the backdrop of the Constitution, and its recognition of the realities of governing. It would have been repugnant to the principles of the Constitution for one state to interfere with the commercial freedom of any other, and removal of obstacles to commercial relations imposed by any state was in the best interests of all states. Moreover, representation as a unified, strong nation in dealings with foreign countries served the people well.

The rationale leading to adoption of the principle of federal control over

foreign commerce being so simple, and yet, compelling, it has been continually endorsed in controversies argued before this Court. In the facts presented by the instant case, the Court is once again being called upon to review the Constitutional principle of federal control over foreign commerce.

In Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), the Court recognized that the commerce clause specifically granted power over foreign commerce to the federal government; it did not specifically exclude the states from the exercise of any authority over the subject matter. Still, the surrendering of this power to the federal government was pivotal in determining whether the actions of the state, in this case the collection of a fee on vessels leaving Philadelphia, were in conformity with the commerce clause. The Court found

that "[i]f they [the states] are excluded [from the commercial power] it must be because the nature of the power, thus granted to commerce, requires that a similar authority should not exist in the states." Id. at 318. Where the federal government has acted, and in those areas inherently national, it was determined that the exercise of similar authority by the states would infringe on the commerce clause. Thus, despite the absence of federal action, state efforts at regulating commerce would be found to be in conflict with the commerce clause if the area was one from which national regulation naturally flowed. In these areas, federal regulation was exclusive. As the Court stated: "Whatever subjects of this power [to regulate commerce] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as

to require exclusive legislation by Congress." Id. at 319

This decision of the Supreme Court, made well over one hundred years ago, is still a sound pronouncement of our federalism as it pertains to foreign commerce. 1/

1/ The following cases, *inter alia,* have cited *Cooley* as enunciating the rule on federal exclusivity under the commerce clause: *Gilman v. Pennsylvania*, 70 U.S. (3 Wall.) 713, 727 (1866) (authority of the state to build bridges over navigable waterways); *Hinson v. Lott*, 75 U.S. (8 Wall.) 148, 152 (1864) (authority of the state to tax liquors brought into the state); *Philadelphia and Reading R. R. Co. v. Pennsylvania*, 82 U.S. (15 Wall.) 232, 280 (1873) (authority of the state to tax freight moving from state to state); *Wilson v. McNamee*, 102 U.S. (12 Otto.) 572, 575 (1881) (validity of state pilotage laws); *Cincinnati, etc. Packet Co. v. Trustees of Cattletsburg*, 105 U.S. (15 Otto.) 559, 563 (1882) (compensation for use of an improved landing); *Kelly v. Washington*, 302 U.S. 1, 14 (1937) (state

Its statement of federal exclusivity over foreign commerce supports the position of the carriers, filing as _amici curiae_, that only the federal government has the authority to tax foreign-owned instrumentalities of foreign commerce. The states' exercise of similar authority affronts the commerce clause of the Constitution because this form of taxation "admit[s] only of one uniform system." _Id_.

Given this controlling interpretation of the commerce clause, it must be concluded that, when considering the appropriateness of state taxation of vessels, the Supreme

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inspection and regulation of vessels); _Burbank v. Lockheed Air Terminal_, 411 U.S. 624, 625 (1973) (validity of city ordinance forbidding jet aircraft from taking off from 11 p.m. of one day to 7 a.m. of the next); and, _Goldstein v. California_, 412 U.S. 546, 553 (1973) (validity of state statute prohibiting the pirating of recordings).

Court has struck down 2/ these taxes, at least in part, on the basis that such taxation was exclusively federal in nature. Thus, when California attempted to impose property taxes on vessels temporarily harbored within the state, which were engaged in trade and commerce and whose "home ports" were in states other than California, the Supreme Court rejected the taxes and held that these ships entered the ports of California "independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the General Government,

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2/ The basis of the Court's espousal of the "home port" doctrine, to be discussed _infra_, apparently draws support from both the due process clause and the commerce clause of the Constitution. This point was noted in _Scandinavian Airlines System v. County of Los Angeles_, 56 Cal. 2d 11, 363 P. 2d 25, 14 Cal. Rptr. 25, _cert. denied_, 368 U.S. 899 (1961).

to which belongs the regulation of commerce with foreign nations and between the states." Hays v. Pacific Mail Steamship Co., 58 U.S. (17 How.) 596, 598 (1855). This initial pronouncement that a vessel could be taxed only by the domiciliary state of its "home port," which cited no controlling provision of the Constitution, appears, by reference to admiralty law and its repeated discussion of ships sailing on the high seas, to have been predicated on the premise that ships which sail the international seas are subject to special rules in their enjoyment of free passage and cannot be controlled or taxed by the states.

This federal exclusivity argument, however, became more firmly grounded in the commerce clause when, in Morgan v. Parham, 83 U.S. (16 Wall.) 471 (1873), the Court upheld the validity of the "home port" doctrine even when the home port

state chose not to impose a tax on its vessels. With the elimination, therefore, of the multiple taxation issue, due process clause support for the doctrine gave way to the commerce clause. Basing the "home port" doctrine on the commerce clause, moreover, explains not only the modifications made to it throughout the years but also its current validity with respect to instrumentalities of foreign commerce. And, foundation in the commerce clause requires that the "home port" doctrine be found controlling in the present case, with the result that California's attempts to tax foreign-owned cargo containers moving in foreign commerce, or any other similarly situated instrumentalities of commerce, be rejected.

Modifications to the doctrine originating in the Hays decision appeared in due course, although none of these decisions

went as far as the California Supreme Court in the instant proceeding when it attempted to knell the death toll of the "home port" doctrine. Thus, for example, in Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891), the Court determined not to expand the "home port" doctrine to the rolling stock of rail companies. Yet, at the same time, the Court strongly affirmed the applicability of the doctrine to commerce by water, by stating that "... the vehicles of commerce of water being instrumentalities of intercommunication with other nations, the regulation of them is assumed by the National Legislature. So that state interference with transportation by water, and especially be sea, is at once clearly marked and distinctly discernible." Id. at 23-24.

As a result of this distinction, taxation by the states of vehicles of interstate commerce which entered the state was

was upheld, American Refrigerator Transit Co. v. Hall, 174 U.S. 70 (1899), and the "apportionment" doctrine of state taxation of vehicles moving in interstate commerce developed. This new doctrine was finally made applicable to vessels moving in inland waterways in Ott v. Mississippi Barge Line, 336 U.S. 169 (1949). The Court, however, did "not reach the question of taxability of ocean carriage but confine[d] [its] decision to transportation on inland waterways." Id. at 173-174. Nor has the Court subsequently reached this question, thereby leaving the "home port" doctrine in place with respect to ocean going vessels.

With the advent of commercial aviation, it was reasonable to anticipate that the issue would be raised as to whether aircraft were subject to the "home port" or to the "apportionment" doctrine. Grounded

as it is in the commerce clause interpretation that certain areas of commerce require one, uniform national system of regulation, it is not surprising that the validity of the "home port" doctrine for aircraft engaged in foreign commerce continues to be controlling. The opposite is true with respect to aircraft engaged in interstate commerce, where the "apportionment" doctrine has become firmly established.

In Northwest Airlines v. Minnesota, 322 U.S. 292 (1944), the Court approved the imposition of a full property tax on the corporation's entire fleet, even though the aircraft were engaged in interstate commerce. While it could be argued that this decision affirmed the applicability of the "home port" doctrine, it is more correct to view the decision as endorsing full taxation by the domiciliary state in the absence of any indication by

any other state of claims for apportioned ad valorem taxes.

When the Court next addressed the subject, in Braniff Airways v. Nebraska Board, 347 U.S. 590 (1954), it did endorse the imposition by Nebraska of an apportioned property tax on aircraft flying into the state which were domiciled in another state. Thus, the "apportionment" doctrine announced in Pullman's Palace Car and expanded in Ott was made applicable to aircraft engaged in interstate commerce, although not even by way of dicta did the Court evidence an inclination to impose the "apportionment" doctrine on foreign commerce. The Court is now, however, being asked to do precisely that and to expand this doctrine to embrace foreign-owned instrumentalities of foreign commerce 3/ and, thereby, break

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3/ In Northwest Airlines, Justice Frankfurter stated:

with a long-established doctrine which is validly rooted in the commerce clause and

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> To what extent it [apportionment] should be carried over to the totally new problems presented by the very different modes of transportation and communication that the airplane and the radio have already introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises questions that we ought not to anticipate; certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship. 322 U.S. at 300.

This reminder is particularly relevant when the Court considers the appropriateness of the proposed state tax on cargo containers, a recently developed instrumentality of commerce, as well as the impact of its decision on other instrumentalities, such as aircraft. Each requires individual consideration.

whose underlying genesis dates to Cooley. The air carriers, filing this brief amicus curiae, urge the Court to reject California's ad valorem property tax on the basis of the long and consistently held "home port" doctrine, which, simply put, is a statement of federal exclusivity in the regulation of foreign commerce. Equity underscores this course of action; the commerce clause demands it.

While the Supreme Court has not yet considered the general appropriateness of a state tax on foreign-owned instrumentalities of foreign commerce or the specifics of this issue as they pertain to one such instrumentality, the cargo container, the general issue is not a new one. Nearly twenty years ago, the city and county of Los Angeles assessed apportioned ad valorem taxes on foreign-owned aircraft. The California Supreme Court rejected such taxation

as conflicting with the "home port" doctrine and with international treaties and executive agreements. Scandinavian Airline System v. County of Los Angeles, 56 Cal. 2d 11, 363 P.2d 25,14 Cal. Rptr. 25, cert.denied, 368 U.S. 899 (1961).

In this case, the court undertook a detailed review of the "home port" doctrine and found that, under the doctrine of stare decisis, the "home port" doctrine could lead directly to rejection of the apportioned taxes. However, due to the novelty of this issue, the court decided it should address the issue on principle. Id. at 32, 363 P. 2d. at 40, 14 Cal. Rptr. at 40. The court determined that an instrumentality of commerce can be taxed in its home port. Moreover, if the instrumentality gains taxable situs in another jurisdiction, it is necessary to apportion the taxes in order to avoid the due process constraints on

double taxation. When the instrumentality is engaged in foreign commerce, however, the solution offered by apportionment is an empty one, according to SAS, since there is no worldwide tribunal to meet out a just and reasonable method of assessing taxes.

It is this very fact that compels exclusive federal jurisdiction. Only national governments in their dealings with other national governments can properly and fairly speak to this issue. Permitting state governments within the U.S. to share in this authority is as obviously inequitable in its effects as it is contrary to the commerce clause in its premise. The endorsement of the "home port" doctrine found in SAS, which asserts federal exclusivity under the commerce clause in accord with Cooley, is only a recent reaffirmation of a long-standing principle. To break with this tradition is unsound, not for the simplistic reason that the principle has

been imbued with wisdom due to its longevity, but because it is a fair and correct interpretation of the commerce clause and has long been recognized as such.

This principle of federal exclusivity was also reaffirmed when, in 1974, the California Supreme Court considered the validity of an ad valorem property tax on cargo containers owned by a U.S. company and moving in interstate and foreign commerce. Sea-Land Service v. County of Alameda, 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974). While the court upheld the validity of the tax, it was most careful to distinguish its decision from that arrived at in SAS. The issue in the earlier case was whether any state could tax the property of a foreign-owned company engaged exclusively in foreign commerce, whereas the Sea-Land case concerned which state could tax the property of a domestic company engaged in both foreign and

interstate commerce. Id. at 786, 528 P. 2d at 65, 117 Cal. Rptr. at 457. Thus, the Sea-Land decision can in no way be considered an overruling of the SAS decision; rather, it is a reaffirmation of the necessity for a "home port" doctrine standard when the subject matter relates exclusively to foreign commerce, and is analogous to the Supreme Court's 1944 decision in Northwest Airlines v. Minnesota, 322 U.S. 292.

While the California Supreme Court in the Sea-Land case was most careful to recognize the distinction between it and the predecessor SAS case, when the court next considered the general issue, in the case now before this Court, it apparently lost sight completely of this most important distinction. In its consideration of Japan Lines v. County of Los Angeles, 20 Cal. 3d 180, 571 P.2d 254, 141 Cal. Rptr. 905, (1977), the court was asked to review the apportioned

tax on cargo shipping containers owned by a foreign company and used exclusively in foreign commerce. While petitioners claimed that the "home port" doctrine was still controlling in the area of foreign commerce, the court concluded that, on the basis of Sea-Land, the doctrine had been rejected. Id. at 185, 571 P.2d at 257, 141 Cal. Rptr. at 908. According to the court, the only difference between the instant case and its 1974 decision was with respect to the ownership of the containers and "Sea-Land is fully dispositive of the commerce clause and federal exclusivity issues raised in the case at bench." Id. at 186, 571 P.2d at 258, 141 Cal. Rptr. at 909.

The amicus parties do not contend that the facts on which the two cases rest are identical but for the question of ownership of the containers. While that distinction is important, it is not the only one. The Japan Line case concerns cargo

containers used exclusively in foreign commerce, and not those used both in foreign and interstate commerce, as is true in Sea-Land. This is a most important distinction. The "home port" doctrine is premised on the principle that the home port has situs jurisdiction over the instrumentality of commerce, which allows for the levying of taxes, and when the instrumentality is involved in foreign commerce, this jurisdiction is exclusive. This is because regulation of an instrumentality of foreign commerce "admit[s] only of one uniform system." Cooley, 53 U.S. (12 How.) at 319.

The lower court's comparison of Sea-Land and Japan Lines completely ignores this critical point and, therefore, fails to heed the distinction, recognized by the California Supreme Court in 1974, between the facts in Sea-Land and those presented earlier in SAS. The Sea-Land court did not reject the directives of SAS; its decision

is a logical outgrowth of it. It recognizes the appropriateness of the apportionment doctrine to the specific facts which were presented to it, facts which were different than those in SAS. It made no attempt to expand its apportionment-based decision to cargo shipping containers moving in foreign commerce and, thereby, preserved the directives of SAS. Those directives are equally applicable to this controversey.

It is urged, therefore, that this Court ratify once again the "home port" doctrine and, thereby, assert the federal exclusivity of taxation on foreign-owned instrumentalities of foreign commerce. The basis of federal exclusivity in the commerce clause of the Constitution, the pronouncement of the Court dating back to Cooley, and general equity principles recommend the correctness of such action.

II. SHOULD THE COURT FIND THE INSTANT AD VALOREM PROPERTY TAX CONSTITUTIONALLY PERMISSIBLE, ITS DECISION SHOULD BE NARROWLY CONFINED TO THE FACTS PRESENTED IN THIS APPEAL

As indicated throughout the prior discussion on federal exclusivity of regulation of foreign commerce, the amici find that the commerce clause to the Constitution and the cited decisions of this Court interpreting it require the rejection of California's property tax on cargo shipping containers. The cargo container is an instrumentality of commerce, albeit a new one when compared to a vessel, and is entitled to the same constitutional considerations provided any other instrumentality of commerce. As the quotation from J. Frankfurter in Northwest Airlines, which appears supra note 3 at 17, makes clear, "more subtle and complicated technological facilities" in transportation can be reasonably anticipated, and each

deserves its own special consideration. The fact that a cargo container may not readily appear comparable to a vessel as an instrumentality of commerce does not deny it that categorization. Rather, current technological advances in transportation must be recognized and reviewed in accordance with the principles established for instrumentalities which preceded them in familiarity of use.

Since the validity of the application of the "home port" doctrine to it depends mightily on the Court's acceptance of the cargo container as an instrumentality of commerce, it is essential that the container be individually scrutinized by the Court. The same particularized attention that is required to be given to the cargo container also necessitates that the decision reached by the Court pertain solely to it. For while the specifics relating

to other instrumentalities are not before this Court, it is clear that blanket endorsement of the state's power to impose property taxes on foreign-owned instrumentalities of commerce will lead directly to a tax assessment on foreign aircraft operating in foreign commerce. This is not mere conjecture; the State Board of Equalization has announced publicly its intention to do so. And, the potential for other states to follow California's lead and, as a consequence, the potential for similar impositions by foreign governments on U.S. air carriers cannot be pushed aside as vague possibilities. They are very real threats. They are also not before this Court, and a decision with respect to them is unnecessary and lacking in factual bases. However, in order that the Court may be persuaded as to the appropriateness of fashioning a narrow decision which relates solely to cargo

containers, should the Court be convinced as to the validity of state taxation of such, the amici believe certain matters should be brought to the Court's attention.

The primary argument advanced in support of the necessity for a narrow decision by the Court is the unique characteristics associated with aircraft engaged in foreign commerce. These aircraft are instruments of commerce traveling international skies. As such, they in many ways resemble the vessels which plied the high seas and formed the basis of the "home port" doctrine. Even when recognizing the emergence of the "apportionment" doctrine, the Court, in Pullman's Palace Car, recognized the aspects of commerce by sea which required it to be given special consideration:

> Ships or vessels...are not subject to taxation in another state at whose ports they incidentally and temporarily touch

> for the purpose of delivering or receiving passengers or freight. But that is because they are not in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, 4/ and therefore can be taxed only at their legal situs, their home port and the domicile of their owners.

141 U.S. at 23.

4/ The California Supreme Court's decision in the instant case drew particular attention to the situs issue when it stated that "[i]t is the continuous presence within the jurisdiction drawing upon the services of that jurisdiction to a significant degree which permits reimbursement through non-discriminatory property taxation as opposed to the fleeting presence of imported goods in transit which may possibly be exempted from such taxation by Michelin" [referring to Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976)] Japan Lines, Ltd. v. County of Los Angeles, 20 Cal. 3d at 187, 571 P.2d at 258-259, 141 Cal. Rptr. at 909-910 (1977). By way of analogy, it is asserted that the foreign air carriers serving California

The same reasoning applies to aircraft engaged in foreign commerce. For the aircraft becomes so colored with international hues that allowing individual states to exercise taxing authority over it flaunts the directives of the commerce clause and the due process clause of the fourteenth amendment. The case law in support of both the "home port" and "apportionment" doctrines recognizes this very critical aspect of international transportation which results in particularized treatment. J. Frankfurter, in his dissent in Braniff Airways, eloquently asserted this distinction by stating that "[i]t stands to reason that the drastic differences between slow-moving trains and the bird-like

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are akin to the "fleeting... imported goods"; they have no continuous presence within the state and, as described more fully *infra*, they do not draw on the services of the state.

flight of airplanes would be reflected in the law's response to the claims of the different states and the limitations of the Commerce Clause upon those claims." 347 U.S. at 604.

The *amici* assert that the particular aspects associated with aircraft in foreign commerce compel, at a minimum, their individual review by this Court. Failure to grant such through a general endorsement of the state's power to tax any and all instrumentalities of commerce would ignore the obvious characteristics of air transportation--characteristics which *amici* claim to be compelling in requiring exclusive federal regulation--without providing an opportunity to present them fully for review. It is simply an area best left to another day.

Additionally, there ought to be considered the premise on which the state's

power to tax property is frequently conditioned. That is, that the tax be in some way connected to the use of the property within the state or to the benefits provided by the state. While this argument has been criticized, Southern Pacific Co. v. Kentucky, 222 U.S. 63, 73 (1911), it still threads its way through situs/due process arguments involving taxation. Thus, it could be argued that the presence of foreign aircraft in a state, though temporary and non-continuous, resulted in taxable situs since the aircraft were the beneficiaries of the state's police and fire protection.

This argument is inappropriate, however, with respect to foreign air carriers serving the major U.S. airports. These carriers, through the payment of landing fees and charges to local airport proprietors, pay their own proportionate share of the services

provided to them, such as those relating to police and fire protection. For example, at Los Angeles Airport, an aircraft charge of \$.52 per 1,000 pounds of maximum landed weight, the weight being authorized by the certificate of airworthiness, is assessed against each scheduled carrier, including scheduled foreign air carriers. The charge is intended to cover the use of the airport for a complete turnround including landing, with accompanying use of the runway, taxiway, terminal building, etc., and then, takeoff. It is estimated that a representative charge for a turnround operation on a B-747 aircraft, which has a maximum landed weight of approximately 564,000 pounds, is \$293.28 (\$.52/1,000 pounds X 564,000 pounds = \$293.28). 5/

5/ International Air Transport Association, International User Charges 146 (2d ed. March 1978).

At San Francisco Airport, where a number of foreign air carriers also operate, the aircraft charge is $.48 per 1,000 pounds of maximum landed weight, with a representative charge for a B-747 approximating $270.72 for each turnround operation. 6/

These charges, paid for each and every turnround operation of the air carriers serving the airport, demonstrate that the carriers pay their own way and, given that the California airports served by scheduled foreign air carriers, Los Angeles and San Francisco Airports, are self-sustaining, it cannot be argued that the carriers are recipients of the largesse of the state. There is, therefore, a due process consideration that would need to be fully explored prior to any assessment of property taxes on the foreign carriers.

6/ Id. at 147-148.

A final area that dictates the narrow consideration of this issue before this Court, as urged by the amici, relates again to the federal exclusivity issue. It concerns the propective imposition of charges, similar in their bases and magnitude to those of California plus those of any other state choosing to follow California's lead, by foreign governments on U.S. air carriers operating in foreign commerce. Since such a development would be of direct economic consequence to the air carriers, filing as amicus curiae, they have a deep and abiding interest in the subject. Their interest is not simply speculative or a modern day example of the little boy crying "Wolf" once too often. It is by now nearly axiomatic that a foreign government will not permit its air carriers, most of which are wholly or partially state-owned, to be at a competitive disadvantage with U.S. air

carriers. 7/ As a result, similar charges, at a minimum, will fall on the U.S. carriers. Moreover, in order not to single out U.S. carriers for discriminatory treatment, 8/ it is possible that similar charges will also fall on the air carriers of all other nations.

7/ Indeed, the U.S. Congress itself enacted legislation specifically designed to assure a fair and equal competitive climate for U.S. carriers operating in international markets in competition with foreign flag carriers. See International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. §1159b (1975).

8/ Such discriminatory treatment would be in violation of the terms of the Convention on International Civil Aviation ("Chicago Convention"), to which some 143 nations--virtually all nations of the world--currently subscribe. See Articles 11 and 15 of the Chicago Convention, open for signature Dec. 7, 1944, 61 Stat. 1180, 1183, 1184-85, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

The ramifications are numerous. There will be a major financial impact on U.S. air carrier operations. Assume that a foreign government, whose air carriers were taxed in, for example, Los Angeles, at a rate of $13.49 per $100 of assessed value, were to impose an identical charge on U.S. carriers. The resulting tax liability for one B-747, with a fair market valuation of $24,000,000, operating into the country once per day and maintaining a turnround presence of approximately two hours would be $415.79 per day or $151,763 per year. 9/ This figure will escalate when

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9/ These figures were arrived at by utilizing the applicable California taxation formula. Two underlying assumptions were made in completing the formula, however. First, the "time in state" factor was assumed to be .0625 $\left(\frac{2 \text{ hours in state}}{24 \text{ hours per day}} \times .75 = .0625\right)$. Second, the "arrival/departure"

multiplied by the number of aircraft entering the jurisdiction and the number of countries imposing similar charges.

As dramatic as these figures are, however, it is important to recognize that not only U.S. air carriers may be faced with them. The air carriers of all other nations serving a particular country may receive similar treatment, 10/ which, of course, will lead to parallel action on their nations' behalves, and so on and on in an area where retaliation begets retaliation. The spiralling effect is obvious. So too is its impact on international aviation. The U.S. Government, as a result of the actions of one if not more of its states,

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factor was assumed to be .125

$\frac{(2 \text{ arrivals/departures in state}}{(4 \text{ total arrivals/departures}} \times .25 = .125)$.

10/ See discussion of the Chicago Convention, _supra_ note 8, at 38.

will be characterized as setting off a chain of events having a serious effect on international air rights, in particular, and on international relations, in general. The lack of wisdom in initiating such an inevitable chain reaction calls out for prevention, and the commerce clause of the Constitution provides it. Its specific grant of authority over matters of foreign commerce to the federal government provides not only an answer, but, in fact, requires one.

An area so obviously enmeshed in international affairs as is the foreign commerce of aircraft demands a single, uniform authority. As the Court said in _Cooley_ over 100 years ago,

> Conflicts between the laws of neighboring states, and discriminations favorable or adverse to commerce with particular foreign nations, might be

> created by state laws...,
> deeply affecting that equality
> of commercial rights, and that
> freedom from state interference,
> which those who formed the Con-
> stitution were so anxious to
> secure, and which the experience
> of more than half a century has
> taught us to value so highly.

53 U.S. (12 How.) at 317. Moreover, the absence of federal taxation in this area is of no weight; failure to exercise specifically granted authority is as much a statement of the U.S. Government's position as a statute which describes it. 11/ The

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11/ In fact, by ratification of the "Chicago Convention" on August 6, 1946, and continued faithful adherence to that treaty since that date, the United States has joined with virtually all nations of the world in an undertaking to assure that international civil aviation operates in a climate exemplified by cooperation and free of friction, discrimination and artificial barriers. Among

important point is that this is a particular area of foreign commerce, which is to be regulated by the federal government.

At a minimum, the regulation of foreign aircraft operating in foreign commerce deserves the critical attention of the Court, which can be provided only by a full factual and legal argument. It is, therefore, urged that the Court, being cognizant of the ramifications that will flow from a general assent to California's

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the many manifestations of this universal intent in the Chicago Convention, the waiver of customs duties on aircraft, fuel, lubricating oils, spare parts and aircraft stores in Article 24, is a singularly impressive indication of the climate envisioned by all governments, including that of the United States. See Preamble and Article 24 of the Chicago Convention, 61 Stat. 1180, 1186, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

levying of an _ad valorem_ property tax on foreign aircraft, refrain from such and, in determining the validity of the tax in the instant case, confine its decision solely to the specific facts and narrow issue presented by it.

CONCLUSION

The history of the commerce clause of the U.S. Constitution and the Court's interpretations of this clause, dating back to _Cooley_, in relation to various instrumentalities of commerce support the continued application of the "home port" doctrine to foreign-owned cargo shipping containers moving in foreign commerce. Although the cargo container represents new technology in the commercial area, this should in no way detract from its proper characterization as an instrumentality of commerce. As such, the "home port" doctrine requires that cargo containers be

taxed, if at all, only at their home port, where _situs_ properly lies. Efforts by any other jurisdiction to exercise authority over the instrumentality for taxing purposes must be rejected. In the instant proceeding, this requires the Court to overturn the decision of the California Supreme Court and, thereby, to reject California's _ad valorem_ property tax on the cargo containers of the appellants.

If the Court determines, however, that the Constitutional grant of authority to the federal government to regulate foreign commerce does not prohibit California's taxation of the cargo containers, the air carriers, filing this brief _amicus curiae_, urge that the Court rule narrowly on this issue. The facts and legal arguments surrounding the imposition by California of an _ad valorem_ tax on foreign-owned aircraft operating in foreign commerce, which is

certain to occur should the Court issue a general pronouncement in this case, are sufficiently different to warrant individual attention. They have not been fully presented to this Court, and are not ripe for review or decision.

SUMMARY OF ARGUMENT

Article 1, section 8, clause 3 of the U.S. Constitution contains a specific grant of power to the federal government to regulate, *inter alia*, foreign commerce. It does not specifically exclude the states from the exercise of concurrent power. However, the surrendering to the federal government of regulatory authority over foreign commerce, being specific, cannot be rejected lightly, and must be found to be exclusive, according to *Cooley*, whenever state action conflicts with that of the federal government and whenever the area of regulation "admit[s] of only one uniform system." 53 U.S. (12 How.) at 319.

When the Court was faced with attempts by state governments to regulate, through taxation, vessels docking at their harbors during the course of journeys on the high seas, the Court, in *Hays*, rejected these efforts and determined that only the "home port" of the vessel could tax it. While this decision concerned interstate as opposed to foreign commerce, it was based, at least in part, on the inability of states to interfere with the free flow of commerce, a decision emanating from the commerce clause.

The "home port" doctrine was modified and narrowed by this Court's decisions over the next one hundred years, but it has been continually sustained as the basis for rejecting taxation of vessels by any state other than that of the home port. State taxation of certain instrumentalities of interstate commerce, including vessels

in inland waterways, railroad rolling stock and aircraft, has been endorsed by this Court under the requirements of the "apportionment" doctrine. But vessels traversing the high seas have never fallen under this taxation doctrine. The reason is simple: the vessel's connection to foreign commerce by virtue of its operation through international waters. Regulation of this instrumentality of commerce is granted to the federal government by the commerce clause, and its regulation by the federal government is exclusive since the area is one which demands but one regulator.

The validity of the "home port" doctrine is equally applicable to other instrumentalities of foreign commerce, such as, in the instant proceeding, foreign-owned cargo shipping containers. The logic associated with its historic application to vessels plying the high seas necessitates

its modern day reaffirmation with respect to this new commercial vehicle. In keeping with the California Supreme Court in the <u>SAS</u> case, this result is not mandated solely on grounds of <u>stare</u> <u>decisis</u>. It is also correct on principle.

If the Court determines that the "home port" doctrine is not controlling, however, and that the decision of the California Supreme Court validating state taxation of foreign-owned cargo containers moving in foreign commerce is correct, the Court's decision should be restricted to the particular commercial instrumentality presented by this appeal. The case law makes clear that different instrumentalities are imbued with special characteristics and, thereby, warrant individual scrutiny. The facts relating to other instrumentalities and, in particular to the airplane, are not before the Court and should not be

reached by this decision. The economic consequences to U.S. and foreign air carriers, and the impact on international air rights and, generally, on international relations compel that these issues be reserved until ripe for decision.

Respectfully submitted,

George S. Lapham, Jr.

James E. Landry

Kathleen O. Argiropoulos
Air Transport Association
of America
1709 New York Avenue, N.W.
Washington, D. C. 20006
Attorneys for <u>Amicus</u> <u>Curiae</u>

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; AND YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., *Appellants*,

v.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; AND CITY OF LONG BEACH, *Appellees*.

On Appeal from the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE

Aer Lingus, Aerolineas Argentinas, Aeromexico, AeroPeru, Air Canada, Air France, Air New Zealand, Air Panama, Avianca, British Airways, BCAL, CP Air, China Airlines, Ecuatoriana, El Al, Iberia, Icelandic, Japan Air Lines, KLM, Korean Air Lines, Laker Airways, LAN Chile, Lufthansa German Airlines, Mexicana, Pakistan International Airlines, Philippine Airlines, Qantas, Sabena, SAS, Singapore Airlines, Swissair, UTA, Varig, *Amici Curiae*

GARY J. TORRE, ESQ.
LILLICK MCHOSE & CHARLES
Two Embarcadero Center, Suite 2600
San Francisco, California 94111
(415) 421-4600

Counsel for Amici

ARTHUR K. MASON, ESQ.
HYDEMAN, MASON & GOODELL
1220 19th Street N.W.
Washington, D.C. 20036
(202) 833-9040

Of Counsel

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THE INTEREST OF THE AMICI IN THIS PROCEEDING

This case presents an appeal from a decision of the California supreme court which dictates the abandonment of an established international taxing pattern

*Popular names. Legal names omitted to conserve space.

that has been built on the foundation of the Court's Home Port doctrine enunciated 123 years ago. The court below held that foreign-owned and based sea-going cargo containers are subject to California ad valorem personal property tax, thereby threatening to erode seriously, if not destroy, the long-standing rule, first approved by this Court in the case of *Hays v. Pacific Mail Steam-ship Co.*, 58 U.S. (17 How.) 596 (1855), that vessels and other instrumentalities of international transport are subject to tax only in their "home port".

The parties to this Brief are 33 foreign air carriers (the Amici) organized and operating under the laws of foreign countries, who provide air transportation services continuously and regularly between points in foreign countries and points within the United States.[1] Appellant and Appellees have consented to their appearance, which consent has been filed with the Clerk of the Court. The Amici fully support the position of Appellants in this case.

This proceeding is of direct interest to those Amici who serve California to the extent that the affirmation of California's right to impose a personal property tax on containers, owned by foreign shipping lines, temporarily present in California is viewed by that

[1] At this time at least 19 foreign flag carriers, including a majority of the Amici, regularly land and take off from airports located within the State of California. In addition, more than 75 foreign air carriers have authority to serve airports in twenty of the states. Most foreign air carriers, including the Amici, operate under bilateral air transport service agreements between their governments and the government of the United States. In all cases these agreements provide for reciprocal rights for United States airlines. The Amici are engaged solely in foreign commerce, being prohibited by treaty and statute from engaging in domestic air commerce.

State as laying the groundwork for a tax on foreign aircraft which land, layover and depart California in the course of providing solely international air transportation. Prompted by and based on the decision below, the California State Board of Equalization has publicly proposed amendments to its regulations to apply an apportioned property tax to foreign aircraft; action on this proposal is pending (Appendix I). It is of interest to those Amici who serve other states to the extent that it would be a precedent for a similar tax in other states.

This case presents an issue of grave concern to the future of all international commerce. *Hays*, enunciating the Home Port doctrine, represents the implementation by the United States of uniformly adopted international law and practice which has existed, in the case of ships, for centuries, and in the case of aircraft and containers, since they were invented. If the decision of the court below is affirmed, it will represent the first instance in modern times that a major commercial nation has sanctioned the imposition of a property tax on the instrumentalities of foreign commerce owned and operated by foreign persons.

It is the position of the Amici that the decision below should not be allowed to stand and that the Home Port doctrine should be reaffirmed as to all foreign instrumentalities of international transportation. Alternatively, if the Court sustains the decision below with respect to containers involved in the appeal, its decision should note the distinguishing characteristics of ships and aircraft which require a different result.

A decision in this case sustaining the Court below and not confined to cargo containers would have far reaching consequences to the Amici:

1. It could determine the property tax liability on aircraft of all foreign air carriers serving California—California has already proposed such a tax (Appendix I).

2. It could determine the right of all other states to impose property taxes on aircraft of foreign air carriers landing and departing within their borders—other states are already contemplating the imposition of similar taxes.[2]

3. It could determine the degree to which foreign nations will consider the adoption of retaliatory measures against U.S. air carriers operating within their borders—several friendly foreign governments have formally raised the likelihood of retaliation (Appendix II).

The prospect of retaliation is not only real but substantial. All aircraft of Amici are fully taxed or subject to tax in the country of their registration. At this time, to the knowledge of Amici, no country, ***including the United States,*** imposes a personal property tax on aircraft based in another country. At this time at least 12 airlines organized and operating under the laws of the United States are providing scheduled passenger and cargo service by air to approximately 62 foreign countries comprising at least 300 flights per week. In addition to scheduled services, substantial international charter operations are performed by U.S. air carriers. These flights are conducted with the use of high value, modern jet aircraft. The Air Transport Association

[2] Brief of Sea Land Services, Inc. as amicus curiae filed on June 12, 1978, pp. 3-4.

has estimated that a single Boeing 747 operating daily to only a single foreign country would incur a tax of $151,000 per year at Los Angeles tax rates.

Thus it would appear that suddenly the international taxing pattern is traumatically transformed from one of reciprocal exemption to reciprocal taxation. Assuming, *arguendo,* that taxation represents a Constitutionally permissable alternative, the choice under the Constitution is for the federal government to make. It is not the prerogative of a single state to take unilateral action precipitating a domino effect that reverses centuries of international practice and understandings.

The subject matter of this case, despite its superficial cloak as a local tax dispute, is a matter of exclusively federal concern. This is not a run of the mill quarrel as to whether there are sufficient state contacts to sustain a reasonably apportioned tax. It involves basic questions of state interference with the conduct of foreign relations and regulation of international shipping and aviation. The issues are so permeated with dominant federal interests that they permit of only a federal solution. Questions are raised under the Supremacy Clause, the Commerce Clause, the Import-Export Clause and Prohibition Against Tonnage Duties Clause of the Constitution.

This matter poses Constitutional issues of the greatest importance and has attracted wide interest nationally and internationally. Embassies of 12 foreign nations have filed Notes of concern with the U.S. Department of State (Appendix II).[3] We are advised

[3] The diplomatic Notes, which are set forth in full in Appendix II, are reprinted with permission of the respective Embassies and the U. S. Department of State.

that the Solicitor General is filing a brief in support of Appellants' position as is the Air Transport Association comprised of domestic U.S. air carriers. The Office of Special Representative For Trade Negotiations has expressed its opposition to the result below.[4] Other organizations, foreign and domestic, may request leave to file briefs with the Court. Should the present worldwide discipline of the Home Port tax doctrine crumble, it is, of course, not possible to predict the eventual consequences. The Amici, being international airlines which serve nations of every conceivable political, economic and social persuasion, are ultimately concerned that a regime of uncontrolled multiple international taxation of aircraft and other instruments of international commerce could result. In the words of the California supreme court in *SAS* v. *County of Los Angeles,* 56 Cal. 2d 11, 42; 363 P.2d 25, 44; 14 Cal. Rptr. 25, 44 (1961), *cert. denied,* 368 U.S. 899 (1961), the "repercussions would be world wide."

In the event the Court does not consider an appeal under Title 28 United States Code, Section 1257(2) to lie as a matter of right, this Court is urged to treat the proceeding as a petition for a Writ of Certiorari pursuant to Title 28 United States Code, Section 2103 and to consider this Brief in support of the grant of a Writ of Certiorari and in support of the position of the Appellants on the merits.

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[4] See Appendix E of Appellant's Jurisdictional Statement.

ARGUMENT

I.

THE *HAYS* CASE REMAINS THE LAW IN THE ABSENCE OF CONTRARY CONGRESSIONAL ACTION.

The case of *Hays* v. *Pacific Mail Steam-ship Co.,* 58 U.S. (17 How.) 596 (1855) states the law of this case. For 123 years this decision has stood for the proposition that a state is without power to impose an ad valorem tax on instrumentalities of foreign commerce, owned and based in foreign countries.[5] It has become part of the fabric of the law regulating foreign commerce and international relations—and the Congress by its failure to affirmatively act to alter the rule has acquiesced therein. The decision of the California supreme court in *SAS* v. *County of Los Angeles,* 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25, (1961), *cert. denied,* 368 U.S. 899 (1961), a plain unequivocal restatement of the *Hays* decision, as applied to foreign based aircraft, presented the Congress, as well as this Court, with an opportunity to review the issue and it has not chosen to do so. Considering that the issue stands at the very intersection of three primary federal interests—foreign relations, foreign commerce, and aviation and shipping, and in view of the position taken by the Solicitor General on behalf of the United States, it is a particularly inappropriate subject for unilateral state action.

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[5] *Ayer & Lord Tie Co.* v. *Kentucky,* 202 U.S. 409 (1906); *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U.S. 385 (1903); *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U.S. 196 (1885); *Morgan* v. *Parham,* 83 U.S. (16 Wall.) 471 (1873).

The drastic change which the present California supreme court would visit upon the law was prophetically deplored by that court in *SAS* when it stated:

> "If, during the 185 years of existence of the United States [a foreign instrumentality of commerce] has been assumed to be nontaxable, it makes little difference whether that belief stemmed from constitutional prohibitions or from considerations of policy. If such assumption were now to be overuled, we would open the doors to state taxation of every ocean vessel which, for 185 years has been believed to be nontaxable. *The repercussions would be world wide.* Retaliatory taxation would be inevitable. The states could not cope with such a situation. . ." *SAS, supra* 56 Cal.2d at 42, 363 P.2d at 44, 14 Cal. Rptr. at 44. (emphasis added)

The rule in the *Hays* was so well established that California, like other coastal states, has, by its own law, disclaimed the power of taxing ocean-going vessels home-ported in the state.[6] In *Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169, 173-74 (1949) this Court left unimpaired the established rule that the tax situs of instrumentalities of foreign commerce is located only in the jurisdiction where they are based. The Court was unwilling to embark on foreign waters and presuppose that the apportionment rule on which state taxation of interstate commerce is based would work in the case of foreign commerce. The Court allows apportioned state taxes, being secure in the knowledge that it may, as an arbiter between national and local

[6] CAL. CONST. art. XIII, § 3(*l*); cf. e.g., N.Y. TAX LAW § 3 (McKinney 1959); MD. TAX. & REV. CODE ANN. § 9(A) (Cum. Supp. 1977); LA. CONST. art. 7, § 21.

interests, prevent multiple burdens on interstate commerce. Neither the Court, nor any other tribunal, however, can act as an arbiter of overlapping national tax schemes fracturing and burdening international trade.[7] Wisely the Court in *Ott* was willing to leave standing the view expressed in *Hays* that instruments of commerce do not lose "their national character nor their home ports" as they move from port to port. *Hays, supra* at 599.

Hays not only stands for a proposition of domestic law, but also constitutes compliance by the United States with a customary principle of international law that is embedded in the web of its international commitments discussed in Section II of this brief.

II.

FOREIGN INSTRUMENTALITIES OF COMMERCE ARE IMMUNE FROM LOCAL PROPERTY TAXES INCONSISTENT WITH THE GOALS OF THE FEDERAL GOVERNMENT IN ITS CONDUCT OF FOREIGN AFFAIRS AND REGULATION OF FOREIGN COMMERCE.

1. The Imposition of This Tax Infringes on the Exclusive Power of the Federal Government to Control External Affairs.

The action of the local authorities under review here constitutes a clear trespass on the paramount power of

[7] This Court in permitting the states to intrude into the area of regulating interstate commerce has emphasized that as an arbiter it may reconcile national and local interests and prevent multiple and unreasonable burdens to interstate commerce. See, e.g. *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 769 (1945). Thus, in *Standard Oil Co.* v. *Peck,* 342 U.S. 382 (1952), the court required the state of the home port of a vessel used in interstate commerce to apportion its tax in order to avoid multiple tax burdens on interstate commerce. At the same time this Court appreciates that it does not sit in a like capacity as impartial arbiter when acts of a foreign official or state are involved. See, e.g., *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 415 (fn. 17) (1964).

the federal government to conduct the external affairs of the United States. The action violates a modus vivendi established between the United States and the international air transport community, and also specific treaty commitments, and it will frustrate clearly defined foreign policy objectives of the United States. Federal foreign policy requires the application of the Home Port doctrine to instrumentalities of foreign commerce. It is axiomatic that the federal government was brought into being to assure a national and not parochial conduct of foreign affairs and a uniform regulation of foreign commerce. The states have no role in this area and are required, by the Supremacy Clause, to subordinate their laws, judicial decisions, and actions to the requirements of a uniform and effective national foreign policy. The United States must speak with one voice in these matters or it cannot credibly speak at all.[8]

The vesting of paramount power over foreign affairs in the national government not only forecloses a state from conducting its own foreign affairs but also requires a state to subordinate to the national interest its policies in areas where the local interests are usually primary. Thus, where a national interest approaches "the first magnitude", the President with the consent of the Senate may by treaty set aside local laws regulating game birds. *Missouri* v. *Holland,* 252 U.S. 416, 435 (1920). By the less formal means of "a protocol, a modus vivendi, a postal convention" or an exchange of correspondence with another nation, a

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[8] See THE FEDERALIST No. 22 (A. Hamilton); *Brown* v. *Maryland,* 25 U.S. (12 Wheat.) 419, 445-46 (1827); *Mobile County* v. *Kimball,* 102 U.S. 691 (1881); See THE FEDERALIST No. 42 (J. Madison); *Inman Steamship Co.* v. *Tinker,* 94 U.S. 238, 245 (1877); *Zschernig* v. *Miller,* 389 U.S. 429, 440 (1968).

state may be compelled to defer to international policy in a peculiarly local area such as that of insurance regulation. See *United States* v. *Belmont,* 301 U.S. 324, 330 (1937); see also *United States* v. *Pink,* 315 U.S. 203, 233-34 (1942). Even without the necessity of prior action by the national government, a state probate law becomes unenforceable when something more than an "indirect" or "incidental" effect on foreign relations is threatened, since in such a case "international controversies of the gravest moment could result" even though a wrong is "imagined" and not "real". See *Zschernig, supra* note 8. In that case the Court said at pages 440-41:

> "It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way . . . The present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it had a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."

Applying these principles to the case at hand, a federal interest in foreign policy, which the states must respect, can be perceived in:

(a) an unbroken, publicly stated, course of conduct over 202 years,

(b) international conventions and understandings, and

(c) a serious threat posed to harmonious commercial relationships throughout the world.

Each of these points merits elaboration.

(a) The United States has pursued a course of conduct over the 202 years of the existence of this repub-

lic, embodied in *Hays,* which prohibited the tax under consideration here. Foreign governments, in structuring their aviation and shipping relationships with this country have justifiably relied on this statement of the U.S. position. (See Appendix II). The undisputed fact that no state has heretofore imposed or been permitted to impose such a tax clearly created *expectations* abroad which became a premise of foreign countries conduct towards U.S. carriers. In the words of the Court in *Belmont, supra* at 330, a "modus vivendi" has been established which is violated by California's action here.

(b) There are specific international agreements to which the United States is a party which reinforce this conclusion. Appellants have briefed in detail the basic treaties of Friendship, Commerce, and Navigation as well as the more specialized treaties, including the Customs Convention On Containers, applicable to the Appellants, that are designed to avoid double taxation that would impede or burden international commerce. There are analogous treaties and agreements affecting international air commerce.[9]

The United States is a party to an umbrella treaty covering contemporary civil aviation—the Chicago Convention of 1944.[10] Two articles of the Chicago Con-

[9] The Convention for the Unification of Certain Rules Relating to International Transportation by Air With Additional Protocol (Warsaw Convention) October 12, 1929, 49 Stat. 3000, T.S. No. 876, 147 L.N.T.S. 11; The International Air Services Transit Agreement, December 7, 1944, 59 Stat. 1693, E.A.S. No. 487, 84 U.N.T.S. 389; The Convention on Offenses And Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963; 20 U. S. T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.

[10] Convention on International Civil Aviation (Chicago Convention) December 7, 1944, 59 Stat. 1516, E.A.S. No. 469, 15 U.N.T.S. 295.

vention are of particular interest. Article 15 dealing with "airport and similar charges" provides in pertinent part as follows:

> "No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon".

Article 24 dealing with customs duties reads in part as follows:

> "Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges".

The scheme of the Convention is clear. Under Article 15 "fees, dues or other charges are not to be imposed on right of transit over entry into or exit from the territory of a contracting state by aircraft of another contracting state". Article 24 states in plain words that aircraft of one contracting state are to be admitted to the other contracting state free of duty. The same restriction can be found in the various bilateral air transport agreements.[11] Thus aircraft employed in international air commerce like cargo containers used in international water commerce have been relieved from duties by Act of Congress.[12]

[11] For example: Agreement for Air Transport Services, March 27, 1946, United States-France, 61 Stat.(4) 3445, T.I.A.S. No.

There can be little doubt that the terms "duties", "fees", "dues", or "other charges" are used in the broadest sense so as to include ad valorem property taxes. The authentic French and Spanish versions of Article 15 use the words "taxes" and "impuestos", respectively.[13] When California asserts a *right* to tax solely by reason of an "entry into" and "exit from" its boundaries, and *in large measure determines the values to be taxed by these factors,* there is little doubt that such charges are incompatible with U.S. treaty commitments and federal legislative and administrative action.[14]

Any trace of doubt remaining as to the meaning of these actions of the national government was surely dissipated by Section III of the Resolution of the Council of the International Civil Aviation Organization (ICAO)[15] adopted in 1966 which provides, in part, as follows:

1679; Agreement for Air Transport Services, December 27, 1946, United States-Peru, 61 Stat.(3) 2586, T.I.A.S. No. 1587; Agreement for Air Transport Services, December 16, 1944, United States-Sweden, 58 Stat. 1466, E.A.S. No. 431; Agreement for Air Transport Services, February 11, 1946, United States-United Kingdom, 60 Stat. 1499, T.I.A.S. No. 1507.

[12] Tariff Act of 1930, § 322, 19 U.S.C. § 1322 (1970).

[13] Protocol on the Authentic Trilingual Text of the Convention on International Civil Aviation, October 17, 1968, 19 U.S.T. 7693, T.I.A.S. No. 6605, 740 U.N.T.S. 21.

[14] This California charge is not only preempted by the national policy exempting foreign aircraft from duties, but also constitutes an additional landing charge that dilutes the national policy of discouraging such burdens on foreign air commerce. International Air Transportation Fair Competitive Practices Act of 1974, § 2, 49 U.S.C. § 1159a (1970).

[15] ICAO was authorized and created by the Chicago Convention in Part II, Articles 43 through 66. It has broad objectives (Article 44) designed to promote, encourage and regulate international air transportation. Many of its functions are delegated to its Council (Articles 50 through 55). The Council's mandatory functions include setting international standards (54(*l*)) and the consideration of any matters relating to the Convention referred to it (Article 54(n)). Pursuant to the Convention, the 15th Session of the ICAO Assembly (composed of all members) meeting in June-July, 1965, instructed the Council to "review the compliance with its Resolutions and recommendations dealing with the problems of the avoidance of multiple taxation and explore, if necessary, on the basis of the latest information from the Contracting States, the possibility of a *new initiative* in this field". (emphasis added).

"The Council Resolves That:

(1) Each Contracting State shall, to the fullest extent, grant reciprocally

* * *

(b) exemption from property taxes, and capital levies or other similar taxes, on aircraft of other Contracting States engaged in international transport".

The United States in its reply to ICAO's request for a report regarding the above quoted Resolution stated:

> "The United States is in accord with the principles set forth in the clause and, in accordance with its existing laws, *has for a long period of time followed the practice of granting the exemption provided in this clause* through bilateral agreements with other countries, or, in appropriate cases by means of administrative rulings." (emphasis added)

This reply only confirmed to foreign nations what they had always believed to be the case; it appeared to allay the need for a "new initiative".[16] The Chicago

[16] See footnote 15; see also, Section III, the U. S. reply, and the Council's commentary, on the Resolution, which are reprinted in full in Appendix III.

Convention was negotiated when there was no doubt that this Court, in determining the Constitutional limits of the states' jurisdiction to tax, had accepted the Home Port doctrine. The rule has been universally observed by U.S. trading partners. Congress, in exercise of its power over foreign commerce, has not modified this rule. But on the contrary Congress has exempted foreign based containers and aircraft from duties when they enter the U.S. as instrumentalities of commerce. See note 12, *supra.*

The Court has made abundantly clear in ***McGoldrick* v. *Gulf Oil Corp.*,** 309 U.S. 414 (1939) that enactment by Congress of customs duties as an exercise of its exclusive power to lay duties on imports under Article I, Section 8, Clause 3 of the Constitution may also constitute a regulation of foreign commerce that preempts the power of the state to impose a tax of general application. It is unnecessary for preemption that the state tax be labeled a customs duty, for, in *McGoldrick,* a New York sales tax with general application like the California ad valorem tax here involved, was preempted by the action of the national government in determining the extent to which property would be subject to or exempted from a duty.

(c) Finally, the disruption by California of a well-settled mode of international taxation threatens world-wide commercial relations. The diplomatic Notes included in Appendix II of this Brief, confirm that the decision of the court below has distressed U.S. trading partners. These Notes, as well as the fears expressed in companion briefs, including the brief of the Solicitor-General, confirm that the anxieties expressed about "worldwide repercussions" by the California Supreme court in the *SAS* case were well taken. Given the fact

that the federal government has provided unmistakable indications to its trading partners that foreign instrumentalities of commerce would be permitted to arrive, layover and depart the United States without imposition of any taxes upon such acts, no one should be surprised by the distress of those trading partners (See, notes 9, 10, 11, *supra.*) They had every reason to believe that, given the pervasive national interest in fostering international air and sea commerce, there was no residual power in California to affect such commerce. See *Hines* v. *Davidowitz,* 312 U.S. 52, 67-68 (1941).[17] The intrusive effect on foreign affairs that concerned the court in ***Zschernig supra*** note 8, is unquestionably presented by California's ad valorem tax on foreign instrumentalities of commerce. The threat of retaliatory taxes directed solely at American aircraft threatens an unravelling of the reciprocal arrangements by which international air commerce has been developed.

Among the vital objectives of U.S. foreign policy which are unrelated to the taxation of interstate commerce, is the interest of the federal government in assuring reciprocal treatment for United States owned instrumentalities abroad. The basis of international air

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[17] The California court in SAS fully appreciated that national action was not always required for preemption of state action by foreign policy considerations,

> "A reading of both the federal and state cases on the subject demonstrates that both courts have considered the subject to embrace a federal question without reference to any theory that it becomes such only when Congress pre-empts the field by enacting legislation. In fact, the basic decisions (both federal and state) have declared the "home-port" doctrine (and hence the invalidity of a proposed tax) although the federal legislature has never spoken on the subject."

SAS, supra, 56 Cal.2d at 21, 363 P.2d at 30, 14 Cal. Rptr. at 30.

commerce is reciprocity.[18] U.S. Courts are without power to deal with such matters when they arise in other countries. It is foreseeable, from the Embassy Notes included in Appendix II, that the result of California's action will be the retaliatory imposition by foreign countries of multiple property taxes on United States carriers without being limited by any rules of apportionment or equity. Compounding the problem is the fact that *only* United States carriers would be subjected to tax while other carriers would continue to enjoy exemption from the retaliating countries; and the ability of the United States government to protect its own carriers from the grossest form of discriminatory taxation abroad will be materially impaired.[19] While the naked threat of foreign retaliation is not a reason for limiting U.S. law, this Court last term acknowledged that, to avoid double taxation of foreign commerce, a principle of law has been adopted (as in *Hays*) upon which "foreign tax systems as well as private expectations [of every major trading nation in the world] . . . have been built" for 80 years, the principle should not be lightly disturbed. ***Zenith Radio Corp.* v. *United States,*** 46 U.S.L.W. 4752, 4756 (1978).

The prospect of substantial retaliation is real. For example, the Embassy of Mexico has advised the State Department:

> "Once the United States abandons the principle of reciprocal exemption from property taxation of aircraft, there is little reason other governments will have to refrain from imposing similar property taxes. No one stands to gain from such an escalation of trade barriers as would come about, least of all carriers of the United States which would find themselves with aircraft subject to property tax in many foreign jurisdictions". Appendix II, p. II-20.

[18] Chicago Convention, arts. 15, 24.

[19] The Notes of the Embassies of the Mexico and Netherlands make this very point. (see Appendix II pages II-17, II-22)

Similar sentiments are clearly apparent in other Notes reprinted in the Appendix.

The Court below, drawing heavily on the dissent in *SAS, supra,* refuses to consider the consequences of "double taxation from foreign authorities" and dismisses the problems created for international trade by suggesting that the national government may negotiate tax treaties providing for apportioned taxes if the burdens become too great.[20] It is astonishing that the court below should attempt to dictate the foreign policy of the United States from Sacramento and force the U.S. Department of State to try to persuade our trading partners to adopt an international apportioned tax scheme. Diplomatic Notes published in Appendix II indicate the cool reception such a proposal is certain to receive.

It is clear that the Constitution through its vesting of the foreign policy and foreign commerce power in the national government did not intend such consequences of the "first magnitude" to be triggered by the unilateral action of any state. ***Missouri* v. *Holland,*** *supra* at 435. See also, ***Cooley* v. *Board of Wardens,*** 54 U.S. (12 How.) 299 (1854).

[20] ***Japan Line, Ltd.* v. *County of Los Angeles,*** 20 Cal. 3d 180, 185; 571 P.2d 254, 257; 141 Cal. Rptr. 905, 908 (1977), which appears in Appendix A to Appellant's Jurisdictional Statement 6a. *See also* S.A.S., 56 Cal.2d 11, 43-49; 363 P.2d 44-48; 14 Cal. Rptr. 25, 44-48 (1961) (Traynor dissent).

2. International Law Forecloses Equating Tax Situs of Movable Instrumentalities of Commerce with Temporary Presence in a Jurisdiction.

It is established that ad valorem property taxes may not be assessed against property that is not present within the taxing jurisdiction; there must be opportunities, benefits, or protections conferred or afforded the property by the taxing state. *See Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 444-445 (1940). *Ott., supra* at 174. Notwithstanding that the situs of property may be established through use of an apportionment formula, mere presence of movable property within the taxing jurisdiction during the tax year if not substantially continuous will not suffice to establish a tax situs. *See Central Railroad* v. *Pennsylvania,* 370 U.S. 607 (1962). Despite the willingness of this Court to condone local formulae to ascertain the situs of movable property moving among the various states,[21] this Court has, when dealing with movable property based in foreign jurisdictions, considered itself bound by the prevailing principles of international law, absent a clear constitutional or statutory command to the contrary. *See McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21 (1963) and cases cited therein. As we shall show, those principles have historically established the home port as the fixed and controlling situs of instrumentalities of commerce.

[21] *See Moorman Manufacturing Co.* v. *Blair,* 46 U.S.L.W. 4703, 4705 (June 15, 1978). *See also, Norfolk & W. Ry. Co.* v. *Missouri State Tax Comm'n,* 390 U. S. 317, 324 (1968); *General Motors Corp.* v. *Washington,* 377 U. S. 436 (1964) (Gross Receipts); *Illinois Cent. RR. Co.* v. *Minnesota,* 309 U. S. 157 (1940) (Gross Earnings); *Rowley* v. *Chicago & N.W. Ry. Co.,* 293 U. S. 102 (1934) (Multiple Factors); *Pullman Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18 (1891) (Track Mileage).

The ocean-going vessel is, of course, the instrumentality of commerce for which these principles were first established, but they apply with like force to aircraft. Long ago, it was decided that a vessel was deemed a part of the mass of property of the country under whose flag it sailed.[22] The United States has been a leading exponent of the view that, in a legal sense, a vessel constitutes a floating parcel of the nation to which it belongs, so that the criminal laws of that nation travel with the vessel on the high seas and from port to port.[23] Hence, this Court, when urged to extend the protection of the Jones Act to seamen serving on foreign flag vessels, rejected the view that "frequent and regular" contact of a vessel with United States ports entitled the United States to "exploit every such contact to the limits of its power," and the Court insisted upon the need for emphatic Congressional directions before creating "conflicting and overlapping" burdens on international trade. *Lauritzen, supra* note 22, at 581-82. A decade later, the Court again emphasized the need to forebear from engrafting salutary national policies upon the operation of foreign instrumentalities of commerce when it refused to extend the protection of national labor laws to seamen employed on foreign vessels calling frequently at United States ports. *McCulloch, supra.* These decisions are not isolated exercises of self-restraint in the sensitive area involving the manning of a vessel but continue the world view adopted at an early date by the

[22] See discussion of *United States* v. *Flores,* 289 U. S. 137 (1933) in *Lauritzen* v. *Larsen,* 345 U. S. 571, 585 (1953).

[23] *Flores, supra* note 22, at 155-159.

Supreme Court, confirmed in the *Hays* case as the basis for decision, and repeatedly reaffirmed thereafter.[24]

The *McCulloch* case demonstrates that contacts with the United States that are more significant than those of the Japan Line's containers in this case are insufficient justification for a transfer of a vessel from the mass of property of the country of its flag to a situs within the United States. In *McCulloch,* the ships were owned by Empresa Hondurena de Vapores, S.A., a wholly-owned subsidiary of United Fruit Company, a New Jersey corporation, primarily American-owned. The ships were time-chartered to United Fruit, which determined their cargoes, sailing schedules, and routings. The ships were engaged primarily in carrying bananas and other tropical produce between Central and South American ports and ports of the United States. The National Maritime Union had petitioned the NLRB to hold an election seeking to represent not only seamen working on Empresa ships, but also seamen working on ships belong to all subsidiaries of United Fruit.[25] Nonetheless, our national labor laws were not allowed to supplant those of the country where the vessel was home-ported.

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[24] As the Court said in ***M/S BREMEN*** v. ***Zapata Off-Shore Co.***, 407 U.S. 1,9 (1972), "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts". See also, ***McLeod*** v. ***United States***, 229 U.S. 416 (1913); ***The PAQUETE HABANA***, 175 U.S. 677 (1900); ***Murray*** v. ***Schooner CHARMING BETSY***, 6 U.S. (2 Chanch) 64 (1804).

[25] ***Sociedad Nacional de Marineros de Honduras*** v. ***McCulloch***, 201 F. Supp. 82, 83 (D.C. D.C. 1962).

The California court, unlike this Court, refuses to recognize that for centuries international law has treated instrumentalities of commerce as sovereign parcels of the country whose flag they carry. This principle, as well as a treaty, protocol, modus vivendi, convention, or a correspondence between nations, constitutes an agreement among the nations. This Court has refused to ignore this principle when considering the application of national legislation to foreign instrumentalities of commerce, out of a concern that international trade would be materially dislocated in the very ways the court below believes irrelevant. See, *Lauritzen, supra,* at note 22. The decision of this Court in *Hays,* supra, together with the treaties and exchanges of correspondence, legislation, and administrative rulings already discussed, all of which respect foreign instrumentalities of commerce as being within the mass of property of the flag they bear and therefore without a tax situs in the United States, clearly demonstrate that California is without power to impose the tax upheld by the court below.

The essential error of the court below results from having viewed this case as involving the existence of a state power until Congress acts otherwise. On the contrary, the limitations on the state power urged by Appellants and Amici derive from the conduct of foreign affairs by the national government, federal legislation and administrative rulings, and the interstitial tissue of the Constitution. These limitations foreclose the tax imposed by California on foreign instrumentalities of commerce.

CONCLUSION

The decision of the court below should be reversed. In upholding a local tax on foreign owned containers it has both ignored the decision of this Court in *Hays* and the succeeding line of cases as well as trespassed upon a clearly defined field of exclusive federal jurisdiction. It is offensive to friendly foreign countries with whom this country has enjoyed amicable and profitable commercial relations, and if affirmed, would tend to seriously disrupt those relations. The reversal of the court below would be a reaffirmation of this Court's historic view of good international citizenship.

While the court below was concerned with a property tax on containers the Court should note that its decision might be controlling with respect to ships and aircraft as well. In the event the Court determines that the arguments urged in this brief do not apply to containers it should note the distinguishing characteristics which require a different result in the case of ships and aircraft.

Respectfully submitted,

Gary J. Torre, Esq.
Lillick McHose & Charles
Two Embarcadero Center, Suite 2600
San Francisco, California 94111

Counsel for Amici

Arthur K. Mason, Esq.
Hydeman, Mason & Goodell
1220 19th Street N.W.
Washington, D.C. 20036

Of Counsel

Appendix I

APPENDIX I

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 1799, SACRAMENTO, CALIFORNIA 95808)
(916) 445-3956

June 28, 1978

Mr. Garry J. Torre
Lilick, McHose, and Charles
Attorneys at Law
Two Embarcadero Center
San Francisco, CA 94111

Dear Mr. Torre:

This letter is in response to your request of June 14, 1978, to be kept informed on the status of the rule change concerning the taxability of foreign airlines we are contemplating as a result of the California Supreme Court decision in *Japan Line, Inc.* v. *County of Los Angeles,* 20 Cal. 3d 180. As you know, the proposed rule change was scheduled for a public hearing on June 29, 1978. We cancelled the public hearing for two major reasons: the task this Board faces in implementing Proposition 13 and the acceptance of jurisdiction by the U.S. Supreme Court of the *Japan Line* case. We do not know when the Board will be able to consider the proposed rule change, but it is conceivable that a public hearing could be held prior to the Supreme Court's determination of the case. When we reschedule the hearing on the proposed rule change you will be notified.

The purpose of the public hearing in such instances is to solicit views of people to be affected by the rule change. Therefore, we would be happy to consider any evidence submitted by you or your clients, whether it be by personal appearance or written brief.

Sincerely,

/s/ D. D Bell
Douglas D. Bell
Executive Secretary

STATE OF CALIFORNIA
STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 1799, SACRAMENTO, CALIFORNIA 95808)
916/445-6479

March 24, 1978

To County Assessors, County Counsels and Other Interested Parties:

Enclosed is a copy of a notice of public hearing to be held June 29, 1978, at 10:00 a.m. in Room 102, 1020 N Street, Sacramento, California on a proposed amendment to property tax Rule 202, Allocation of Aircraft of Certificated Air Carriers and Scheduled Air Taxi Operations.

The amendment extends the situs rule of subdivision (b) of Rule 202 to aircraft operated solely in foreign commerce. The Board's legal staff is of the opinion that two recent cases, Sea-Land Service v. County of Alameda, 12 Cal. 3d 772, and Japan Line, Ltd. v. County of Los Angeles, 23 Cal. 3d 180, have overturned the former rule that aircraft operated solely in foreign commerce are protected from state property taxation by the Home-Port Doctrine. These two cases hold that the Home-Port Doctrine does not shield property with situs in California from taxation on an apportioned basis. Because our property tax rules are merely declarative of existing law, we propose to amend Rule 202 to conform to these court decisions.

Written comments with respect to the enclosed notice are welcome and should be directed to me. If you wish to present testimony pertaining to the amendment at the hearing, please notify me by mail or telephone by June 14, 1978, so that an orderly agenda can be prepared.

Sincerely,

/s/ Janice Masterton
Janice Masterton
Calendar Clerk

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE STATE BOARD OF EQUALIZATION

Notice is hereby given that the State Board of Equalization, pursuant to the authority vested by Section 15606 of the Government Code, and to implement, interpret or make specific Sections 1150 through 1156 of the Revenue and Taxation Code proposes to amend Section 202(b) of Article 5, Subchapter 2, Chapter 1, Title 18, of the California Administrative Code, as follows:

1. Amend Section 202, subsection (b), Article 5, subchapter 2, chapter 1 to read:

Rule No. 202. (Cal. Adm. Code) ALLOCATION OF AIRCRAFT OF CERTIFICATED AIR CARRIERS AND SCHEDULED AIR TAXI OPERATORS

(b) SITUS. Aircraft ~~of United States registry~~ operated by certificated air carriers (within the meaning of section 1150 of the Revenue and Taxation Code) or scheduled air taxis (within the meaning of subdivisions (a) and (b) of section 1154 of the Revenue and Taxation Code) and flown in intrastate, interstate, or foreign commerce shall be deemed to be situated only in those taxing agencies (within the meaning of section 404 of the Revenue and Taxation Code) in which the aircraft normally make physical contact. The physical contact must be intentional rather than by accident or as the result of an emergency, and it must involve embarking or disembarking of crew, passengers, or freight.

Aircraft flying over the state without landing do not acquire situs for property tax purposes. Conversely, the situs of aircraft that depart from a taxing agency within the state, fly out of the state, and return to the same or another taxing agency within the state without landing outside the state is within the state's taxing jurisdiction throughout the flight.

Situs for property tax purposes is not affected by the legal or commercial domicile of the operator of the aircraft, ~~except that Foreign-owned and based aircraft operated solely in Foreign Commerce do not acquire a situs within the State for property tax purposes~~ *nor by the fact that the aircraft is operated solely in foreign commerce.*

Notice is also given that any person interested may present statements or arguments orally or in writing relevant to the action proposed, at Room 102, Consumer Affairs Building, 1020 N Street, Sacramento, CA 95814 at 10:00 a.m. on June 29, 1978. The State Board of Equalization upon its own motion or at the instance of any interested person, may thereafter adopt the above proposed amendment substantially as set forth without further notice.

Upon request, copies of the above regulation may be obtained from:

State Board of Equalization
1020 N Street
Sacramento, California 95814

The State Board of Equalization, has determined that, pursuant to Section 2231 of the Revenue and Taxation Code, no increased costs or new costs to local government will result from this regulation.

Dated: March 15, 1978 STATE BOARD OF EQUALIZATION

/s/ GORDON P. ADELMAN
for DOUGLAS D. BELL
Executive Secretary

State of California

BOARD OF EQUALIZATION

PROPERTY TAX RULES AND REGULATIONS

Chapter 1. State Board of Equalization—Property Tax
Subchapter 2. Assessment
Article 5. Situs

References: Sections 1150-1156, Revenue and Taxation Code

Rule 202. ALLOCATION OF AIRCRAFT OF CERTIFICATED AIR CARRIERS AND SCHEDULED AIR TAXI OPERATORS

(a) AIR TAXIS. An aircraft whose owner on the lien date used it in scheduled air taxi service at any time during the representative period selected pursuant to subsection (f), or which has been purchased for scheduled air taxi service but not yet put into such service and not yet used in any other service, is assessable under sections 1150 to 1156 of the Revenue and Taxation Code and not under Part 10, Division 1, or under other situs provisions of Part 2, Division 1, of the Revenue and Taxation Code.

(b) SITUS. Aircraft operated by certificated air carriers (within the meaning of section 1150 of the Revenue and Taxation Code) or scheduled air taxis (within the meaning of subdivisions (a) and (b) of section 1154 of the Revenue and Taxation Code) and flown in intrastate, interstate, or foreign commerce shall be deemed to be situated only in those taxing agencies (within the meaning of section 404 of the Revenue and Taxation Code) in which the aircraft normally make physical contact. The physical contact must be intentional rather than by accident or as the result of an emergency, and it must involve embarking or disembarking of crew, passengers, or freight.

Aircraft flying over the state without landing do not acquire situs for property tax purposes. Conversely, the situs of aircraft that depart from a taxing agency within the state, fly out of the state, and return to the same or another taxing agency within the state without landing outside the state is within the state's taxing jurisdiction throughout the flight.

Situs for property tax purposes is not affected by the legal or commercial domicile of the operator of the aircraft, ~~except that Foreign-owned and based aircraft operated solely in Foreign Commerce do not acquire a situs within the State for property tax purposes~~ *nor by the fact that the aircraft is operated solely in foreign commerce.*

(c) ALLOCATION FORMULA. The allocation formula to be used by each assessor is composed of two factors: (1) ground and flight time and (2) aircraft arrivals and departures.

Time allocable to an airport is the amount of time that certificated aircraft and scheduled air taxis are on the ground at the airport, plus a portion of the incoming and outgoing flight time computed pursuant to subsection (d). The ratio of the time allocable to the airport during a representative period to the sum of the time allocable to the airport and the time allocable elsewhere is the ground and flight time factor. In computing the ground and flight time factor, the following shall be excluded:

Rule 202. ALLOCATION OF AIRCRAFT OF CERTIFICATED AIR CARRIERS AND SCHEDULED AIR TAXI OPERATORS. (Cont. 1)

From the time allocable to the airport—

(1) All ground and flight time prior to the aircraft's first entry into the revenue service of the air carrier in control of the aircraft on the current lien date.

(2) All ground time in excess of 12 consecutive hours at the airport following entry into revenue service.

From the total time—

(1) All ground and flight time prior to the aircraft's first entry into the revenue service of the air carrier in control of the aircraft on the current lien date.

This factor shall be multiplied by 75 percent to obtain a weighted ground and flight time factor.

The aircraft arrivals and departures factor is the ratio of the number of arrivals at and departures from an airport during a representative period to the total number of arrivals at and departures from all airports during the representative period. This factor shall be multiplied by 25 percent to obtain a weighted arrivals and departures factor.

The weighted time factor shall be added to the weighted arrivals and departures factor. The sum of the two weighted factors yields the allocation ratio to be applied to the full cash value of the aircraft to determine the full cash value allocable to the airport.

(d) Allocation of Flight Time. For aircraft flying from one California airport to another California airport, the flight time attributable to each airport is one-half the flight time between the airports.

For aircraft arriving from an airport outside the state or leaving for an airport outside the state, the flight time from or to the state boundary shall be allocated to the California airport in which the aircraft first lands or last takes off, as the case may be. The flight time to the state boundary shall be computed as follows: (1) determine the mileage from the airport to the state boundary crossing point on a great circle flight to the first landing point outside the state; (2) divide this mileage by the total great circle mileage from the airport to the first landing point outside the state; (3) multiply this percentage by the total flight time from the airport to the first landing point outside the state. The same procedure shall be used for inbound flights from outside the state. To allow for differences in take-off, landing and cruising speeds and for varying take-off and landing patterns, the time allocated to an airport shall not be less than five minutes for an incoming or an outgoing flight. In lieu of the actual flight time for a single flight, the average flight time between two ports, or between a port and the state line, for two or more flights of a single carrier or of more than one carrier shall be used when such an average is promulgated by the board unless the assessor has documented evidence which justifies departure from such average time.

(e) Sources of Allocation Data. For scheduled operations, arrivals and departures and ground and flight time shall be derived from the carrier's operating schedules. For nonscheduled operations, including but not limited to, overhaul, pilot training, charter, military contract flights, and standby services, ground and flight time and arrivals and departures shall be derived from the carrier's recorded operations.

(f) Representative Period. Annually, on or before February 15, the board shall consult with the assessors of the counties in which air carriers' aircraft normally make physical contact. On or before March 1, the board shall designate a representative period to be used by all assessors in accessing the aircraft of each carrier for the forthcoming fiscal year.

Rule 202. Allocation of Aircraft of Certificated Air Carriers and Scheduled Air Taxi Operators (Cont. 2)

(g) Application of Allocation Formula. The aircraft of certificated air carriers and scheduled air taxi operators shall be segregated by type, and a separate allocation ratio shall be computed for each type which has established a tax situs within the state, excluding those makes within a type which have not established a tax situs within the state. Each allocation ratio shall then be applied to the total value of the carrier's aircraft of each type to which the allocation

ratio applies, excluding those makes within a type which have not established a tax situs within the state.

The types are as follows:

(1) Piston-powered

(2) Turboprop-powered

(3) Helicopter

(4) Turbojet and Turbofan powered

(A) Two engine

(B) Three engine

(C) Four engine

(D) DC-8-60 series

(E) Boeing 747

(F) DC-10 and L 1011

History: Adopted March 9, 1967, effective March 10, 1967. Amended January 8, 1969, effective February 12, 1969.

Amended December 12, 1969, effective January 11, 1970.

Amended February 16, 1970, effective March 26, 1970.

Amended December 20, 1971, effective January 19, 1972.

Amended February 21, 1974, effective February 26, 1974.

Amended December 17, 1975, effective January 25, 1976.

Appendix II

APPENDIX II

California Property Tax

(Note to State Department)

June 19, 1978

The Canadian Embassy presents its compliments to the Department of State and has the honour to refer to a circular of the California State Board of Equalization dated March 24, 1978, pertaining to an amendment to the California Tax Regulations. The purpose of this amendment is to enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Canadian Embassy wishes to express the concern of the Canadian Government at the apparent inconsistency of this proposal with the Convention on International Civil Aviation to which both Canada and the United States are parties and of which Article 24 specifically states that "aircraft on a flight to, from, or across the territory of another Contracting State shall be admitted temporarily free of duty". It is the understanding of the Canadian Government that this exemption applies to any form of taxation, whether imposed by national or state authorities. It will also be noted that Article 15 of the same Convention stipulated that "no fees, dues or other charges shall be imposed by any Contracting State in respect only of the right of transit over or entry or exit from its territory for any aircraft".

The Government of Canada wishes furthermore to draw the attention of the Government of the United States to Section III of the ICAO Council Resolution of the taxation of income of international air transport enterprises and the taxation of aircraft, and particularly to paragraph 1(B) of that section, whereby "each Contracting State shall, to the fullest extent possible, grant reciprocally . . .

exemption from property taxes . . . on aircraft of other Contracting States engaged in international air transport". The Government of the United States will also recall its statement in that connection to that effect that it "is in accord with the principles set forth in this clause" and that it has "for a long period of time followed the practice of granting the exemptions provided for in this clause through bilateral agreement with other countries, or, in appropriate cases, by means of administrative ruling".

The Government of Canada wishes furthermore to refer to the Air Transport Agreement between Canada and the United States of January 17, 1966, as amended, and particularly to Article XI of that Agreement, which stipulates that "each Contracting Party shall exempt the designated airlines of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, inspection fees and other national duties . . .". While this provision does not explicitly rule out a state-imposed property tax on Canadian aircraft used in international service, it will be clear that such a tax would negate the very intent of this provision and that it would introduce a new element in regard to the equitable exchange of benefits expected to be derived from that Agreement.

It will be apparent that the Canadian Government is concerned at the repercussions of a proposal, which, if enacted, would open the way to similar application by the authorities of other states. As, moreover, Canadian aircraft are already fully taxed in Canada, the application of such a tax by any state would result in double taxation, the effect of which would be to alter the present position of reciprocity. It is finally clear that the imposition of such a tax, in addition to introducing a potentially destabilizing factor in air relations, would place on foreign airlines, and in particular on Canadian airlines in view of the extensiveness of air service between our two countries, an additional

and substantial burden at a time when those airlines are engaged in making air travel more readily accessible to the travelling public.

The Government of Canada hopes that these concerns will be taken into account by the Government of the United States and that, should the intention of the California State Board of Equalization be confirmed, appropriate action would be taken by the Government of the United States of America to prevent the imposition of a property tax on foreign aircraft by the State of California.

The Canadian Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

The Embassies of Denmark, Norway and Sweden present their compliments to the Department of State and have the honour to refer the Department of State to a March 24, 1978 letter from the California State Board of Equalization (copy attached). Attached to this letter is a proposed amendment to the California Tax Regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Governments of Denmark, Norway and Sweden submit that the imposition of a property tax on aircraft owned by foreign airlines operating into and out of California would be contrary to the obligations set forth in Articles 15 and 24 of the Convention on International Civil Aviation and the United States representations to the other Contracting States of the Convention with respect to the exemption from property taxes on aircraft engaged in international air transportation, as set forth in the Supplement to ICAO Document 8632-C/968. The attention is invited in particular to Clause (1) (B) Section III of the ICAO Document containing Council Resolution of 14 November 1966 on Taxation of the Income of International Air Transport Enterprises and on Taxation of Aircraft. In accordance with this Resolution, each Contracting State, were to notify ICAO of the extent to which it was prepared to take action in accordance with the principles of this Resolution. In this regard, the United States represented to the other Contracting States of ICAO that:

> "The United States is in accord with the principles set forth in this Clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this Clause through bilateral agrements with other countries, or in appropriate cases, by means of administrative rulings".

The United States' statement then went on to declare that such agreements had been concluded today with several countries. Thus, it is the opinion of the Government of Denmark, Norway and Sweden that the United States has already adopted a policy of exempting aircraft which are engaged in international air transportation from the levy of any property tax within the United States.

The Governments of Denmark, Norway and Sweden would also like to note various policy factors which are relevant to this issue. Aircraft operating in international air transportation under the flag of Denmark, Norway or Sweden are already subject to full taxation in those countries. If a property tax were to be imposed by the United States or any individual State or political subdivision thereof, the aircraft would be doubly taxed. Such a double tax burden would be unfair to the air transport enterprises involved and would also be an impediment to the development of trade and travel between our countries. The avoidance of such a situation was the purpose for which Section III of the ICAO Council Resolution of 14 November 1966 was formulated and approved.

Furthermore, it seems clear to the Governments of Denmark, Norway and Sweden that the imposition of a property tax on the aircraft of non-U.S. airlines operated to and from the United States may lead to taxation of aircraft of U.S. airlines by foreign Governments and their local political subdivisions. No one stands to gain from such an escalation of trade barriers.

The Governments of Denmark, Norway and Sweden are deeply concerned with the possible international complications which could result if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. The Governments of Denmark, Norway and Sweden urge the Government of the United States to take immediate and appropriate action to prevent the imposition of a property tax on foreign aircraft by the State

of California in order to assure continued growth and development of trade and other relations between our countries.

Washington, D.C.

June 13, 1978

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to inform the Department of the following matter:

By circular letter, dated March 24, 1978 the California State Board of Equalization has expressed its intent to assess property taxes against foreign owned and operated aircraft employed in the foreign commerce of the United States and using facilities in California. A proposed Amendment to the California Tax Regulations is pending.

This Embassy has been instructed to express the strong concern of the Government of the Federal Republic of Germany that this tax if imposed will constitute an undue burden on and impediment to the flow of international such a result would be in contradiction to the intentions of traffic and Commerce and will be in violation of multilateral and bilateral international Commitments of the United States of America.

Article 24 of the "Chicago Convention" provides that aircraft of contracting parties be admitted temporarily to the territory of other contracting parties free of duty. Both the Federal Republic of Germany and the United States are parties to that convention.

It is the position of the Government of the Federal Republic of Germany that, as far as this provision is concerned, no difference can be made between State—or Federal Taxes—or duties in the United States. Article 24 is intended to facilitate international air transportation, its purpose would be destroyed if its commitment would only bind the federal authorities. It seems obvious that the contracting parties.

Furthermore, Paragraph 1 (b), Section III of the ICAO Council Resolution of November 14, 1966 requires that member countries grant each other exemption from property taxes for aircraft engaged in International Air Transportation on the basis of reciprocity. The Government of the United States informed ICAO that it adheres to this principle either by bilateral agreements or through administrative rulings. There are no taxes assessed against foreign Aircraft in the Federal Republic of Germany.

Article 7 of the Air Transport Agreement between the Federal Republic of Germany and the United States of America of July 7, 1955 stipulates that certain activities and transactions connected with the operation of German civil aircraft on the territory of the United States of America be exempted from duties, fees and charges. Aircraft as such are not mentioned in the Bilateral Agreement. This is due to the fact (as reflected by the proceedings of the negotiations in 1955) that both contracting parties agreed that the exemption of aircraft is covered by Article 24 of the Chicago Convention. An inclusion in the Bilateral Agreement was therefore considered not to be necessary.

This Embassy wishes to point out that the question whether the exemption of Article 7 applies only to Federal and not to State taxes in the USA has been disputed before. The Government of the Federal Republic of Germany wishes to reiterate its position that according to its interpretation of the Treaty, Federal, State and Local taxes are covered by the exemption.

The imposition of State Taxes on German aircraft in California would raise serious doubts whether the principle of reciprocity which governs the exemption of US-aircraft in the Federal Republic of Germany is still maintained and would lead to a reevaluation of that situation by German tax authorities. Furthermore, apart from the distortion of cost structures between airports the California tax example might induce other States to levy com-

parable taxes on foreign aircraft and eventually on other modes of international transportation as well. Retaliation by other countries might then subject international carriers to multiple taxation which would be clearly in contradiction to efforts to facilitate international Commerce.

Washington, D.C., June 23, 1978

TRANSLATION

June 28, 1978

The Embassy of France presents its compliments to the State Department and has the honor to state the following:

The Embassy of France has been informed of the California State Board of Equalization's intent to modify its fiscal regulations in order to enable it, as well as the local tax assessors, to levy a property tax on airplanes owned by foreign airlines which operate a commercial service to and from California. This intention was published by a circular letter from the California State Board of Equalization dated March 24, 1978.

The proposed tax would be imposed by the local fiscal authorities as well as the State of California's on aircraft assigned to international routes by foreign airlines, and would not be based on the cost of any services rendered.

French authorities would remind you that they do not impose, at any level, a similar tax on planes owned by foreign airlines, including American planes operating to and from France.

They thus feel that imposing this tax on aircraft owned by French companies would constitute a discrimination contrary to the provisions of the Protocol of signature of the Agreement between France and the United States of America and signed in Paris on March 27, 1946, with respect to airline services between their respective territories.

This Protocol stipulates:

"It appeared in the course of negotiations leading up to the conclusion of the agreement on air services between French territory and the territory of the United States of America signed at Paris today, that the representatives of the two contracting parties were in agreement on the following points:

1. The air carriers of the two contracting parties, operating on the routes described in the annex of said agreement shall have equal opportunity for the operation of the said routes".

The imposition of the proposed tax would lead to an imbalance in the existing double taxation agreements currently being negotiated between the two countries.

Consequently, the French authorities ask the American authorities that the French airlines be exempt from the scope of application of the proposed tax. They would recall to you, in the exchange of letters of July 29, 1967, annexed to the French-American Convention on income taxation, the U.S. government gave its assurance that it would intervene with such States, considering subjecting our airlines to local taxation, in exchange for the assurance that we would not subject American companies to taxation.

The French authorities also wish to call the attention of the American authorities to Section III, paragraph (B) of the Resolution of the Council of the ICAO dated November 14, 1966, which declares that "Each contracting state shall, to the fullest possible extent, grant reciprocally (B) the exemption from property taxes and capital levies or other similar taxes on aircraft of other Contracting States engaged in international air transport".

Following the adoption of this resolution, American authorities declared, in a precise and unequivocal manner, to the other Contracting States of the ICAO, that they were in accord with such principles and had, for a long time and conforming to their laws, granted the exemption provided for by this resolution through bilateral agreements with other countries or through appropriate administrative measures.

In addition, such a tax would be incompatible with the principle of non-discrimination established by the Chicago Convention, namely in Article 15 which specifically stipulated:

"No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon".

French authorities wish to emphasize that, if the imposition of this tax would be authorized, other States of the United States might also want to impose a similar tax. This would seriously increase the costs of operation of the French airlines—which are already taxed in France—to the detriment of not only those companies, but also the public.

Finally, they believe that the enforcement of such a tax, might lead to similar measures of taxation by local or national authorities of other foreign countries which would result in a hindrance to the development of air travel.

In the light of these observations, French authorities would appreciate it if the State Department would inform them on the measures which American authorities intend to take to prevent the State of California from imposing a property tax on foreign aircraft.

The French Embassy takes this occasion to renew its high consideration to the State Department.

EMBASSY OF JAPAN
WASHINGTON
July 20, 1978

AIDE-MEMOIRE

The Board of Equalization of the State of California has recently proposed an amendment to Section 202 of its Tax Regulation which would enable the State of California and its local county assessors to levy a local property tax on foreign aircraft engaged in air service to and from the State of California. With regard to the proposed tax, the Japanese Government invites the attention of the U.S. Government to the following points and hopes that, with a view to developing and maintaining smooth commercial relations between our two countries, the U.S. Government would take appropriate measures to prevent this taxation.

1. Article 24 of the Convention on International Civil Aviation, which stipulates mutual exemption of duties among contracting countries, and other articles of Chapter 4 of the Convention set forth measures to facilitate the smooth operation of international civil air transportation. This proposed taxation would be in contradiction to the fundamental concepts envisaged in Chapter 4 of the Convention because it would be a barrier to the smooth operation of international civil air transport services.

2. While Paragraph 1(b), Section III of the ICAO Council Resolution of November 14, 1966, requires that member countries grant each other exemption from property taxes for aircraft engaged in international air services and the U.S. Government, in this respect, explicitly announced that it would adhere to the principles set forth in this Resolution, it seems that the proposed tax would not go along with the spirit of the Resolution.

3. As to municipal taxes in Japan which correspond to the proposed tax, no such taxes are assessed at present against foreign aircraft in Japan. If this proposed tax is

implemented, an inconsistency would therefore be brought about between the two countries in connection with the imposition of taxes on foreign aircrafts. This situation could interfere with the smooth commerce between our two countries and, accordingly, the Japanese Government is deeply concerned about the future development of this matter.

The Embassy of the Republic of Korea presents its compliments to the Department of State and has the honour to refer to the letter of March 24, 1978 from the California State Board of Equalization, together with the proposed amendment to the California Tax Regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

In this connection, the Embassy takes a serious view of the possible international complications which might result if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. Such action appears to contradict the United States treaty obligations set forth in Article 24 of the Convention on International Civil Aviation as well as Section III of the ICAO Council Resolution of 14 November 1966 on Taxation of the Income of International Air Transport Enterprises and on Taxation of Aircraft.

It is also noted that in the light of the principle of reciprocity underlying Article 11, paragraph 5 of the Treaty of Friendship, Commerce and Navigation between the Republic of Korea and the United States of America of 28 November 1957 which stipulates that each Party reserves the right to extend specific tax advantages on the basis of reciprocity, the imposition of such a tax burden on the Korean air transport enterprise seems to be extremely unfair and may impede the smooth development of trade and travel between the two countries.

In view of the above considerations, the Embassy respectfully urges the Government of the United States of America to take an appropriate action to prevent the imposition of a property tax on foreign-registered aircraft by the State of California in order to assure continued growth and development of trade and other co-operative relations between our two countries.

The Embassy of the Republic of Korea avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

August 16, 1978

Washington, D.C.

UNOFFICIAL TRANSLATION

The Embassy of Mexico presents its compliments to the Department of State and has the honor to refer the Department of State to a March 24, 1978 letter from the California State Board of Equalization (copy attached). Annexed to this letter is a proposed amendment to the California Tax Regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Government of Mexico respectfully submits that the imposition of a property tax on aircraft owned by foreign airlines operating into and out of California would directly contravene the United States' treaty obligations set forth in Article 24 of the Convention on International Civil Aviation (the "Chicago Convention") and the United States' representations to the other Contracting States of the Convention with respect to the exemption from property taxes on aircraft engaged in international air transportation, as set forth in the supplement to ICAO Document 8632-C/968.

The Government of Mexico respectfully invites the attention of the Department of State to the language of Article 24 of the Chicago Convention which states that "aircraft on a flight to, from, or across territory of another contracting State are to be admitted temporarily free of duty..." In the considered opinion of the Government of Mexico, the exemption from "duty" provided by the Convention must necessarily include an exemption from property taxes, whether attempted to be imposed by the United States of America itself or by any individual State or political subdivision thereof. If this were not so, the exemption from "duty" would have little practical value or meaning.

The attention of the Department of State is also invited to Section III of the ICAO "Council Resolution of 14 November 1966 on Taxation of the Income of International

Air Transport Enterprises and on Taxation of Aircraft," and particularly Clause (1) (b) thereof, which states:

> "(1) *Each Contracting State shall,* to the fullest extent possible, *grant* reciprocally
>
> (b) *Exemption from property* tax, and capital levies or other similar taxes, *on aircraft of other Contracting States engaged in international air transport; . . .*" (Emphasis supplied).

In further accordance with this resolution, the Department of State is reminded that each Contracting State, including the United States, was to notify ICAO of the extent to which it was prepared to take action in accordance with the principles of this Resolution. In this regard, the United States specifically and unequivocally represented to the other Contracting States of ICAO that:

> "The United States is in accord with the principles set forth in this Clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this Clause through bilateral agreements with other countries, or, in appropriate cases, by means of administrative rulings."

The United States' statement then declares that such agreements have been concluded today with over forty countries, including Mexico. Thus, it is respectfully the opinion of the Government of Mexico that the United States has already committed itself to a practice of exempting aircraft operating under the flag of Mexico and which are engaged in international air transportation from the levy of any property tax within the United States.

The Government of Mexico would also invite the Department of State's attention to the consideration of various policy factors which are necessarily germane to this issue:

First, aircraft operating in international air transportation under the flag of Mexico are already subject to full txation in Mexico. Thus, if property tax were to be imposed by the United States or any individual State or political subdivision thereof, the aircraft would thus be doubly taxed —by the Government of Mexico and also by the United States. Such a tax burden is both unfair to the air transport enterprises involved and also a frustrating, but preventable, impediment on the smooth development of trade and travel between our two countries. It is indeed the very purpose for which Section III of the ICAO Council Resolution of 14 November 1966 was formulated and approved.

In the particular case of Mexico and the United States, there is an agreement effected by exchange of notes signed at Washington August 7, 1964 and applicable with taxable years beginning on or after January 1st, 1964 for the relief from double taxation on earnings from operation of ships and aircraft, through reciprocal exemption.

Although the agreement only covers federal income taxes, we believe that the imposition of a tax on capital represented by the aircraft is of such analogous character that it would substantially violate the spirit of our agreement and consequently give rise to its possible termination according to point four of both exchange notes.

When the agreement was being negotiated, the Ministry of Foreign Affairs of Mexico specifically raised the issue of state or local authorities contravening the agreement by imposing taxes on ships and aircrafts, and although it was not inserted into the agreement, it was thought that the proper remedy for such violation would be the termination of the agreement.

Secondly, it seems clear to the Government of Mexico that the imposition of a property tax on the aircraft of non-U.S. airlines operated to or from the United States of America in foreign commerce could immediately lead to the taxation of aircraft of U.S. airlines by foreign govern-

ments and their local political subdivisions. Once the United States abandons the principle of reciprocal exemption from property taxation of aircraft, there is little reason other governments will have to refrain from imposing similar property taxes. No one stands to gain from such an escalation of trade barriers as would come about, least of all carriers of the United States which would find themselves with aircraft subject to property tax in many foreign jurisdictions.

The Government of Mexico is deeply concerned about the possible international complications which could result if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. The Government of Mexico respectfully urges the Government of the United States to take immediate and appropriate action to prevent the imposition of a property tax on foreign-registered aircraft by the State of California, in order to assure continued growth and development of trade and other relations between our two countries. This is specially important at a moment in which our two countries have just signed a new agreement in civil aeronautics that responds to the philosophy of both our Governments with respect to the substantial lowering of the rates for air transportation as an effective means of bringing our people together. The proposed tax by the State of California would set an ominous example to other local authorities and would certainly seem to negate the declared international policy of the Carter Administration with respect to the elimination of non-tariff trade barriers.

The Embassy of Mexico believes that the proper forum for the United States Government to oppose such action, will be the hearing that the California State Board of Equalization will hold in Sacramento June 29, 1978. In this respect, there is a position developed by the Administration on a parallel case and embodied in the letter that on December 19, 1977 the General Counsel of the Office of the Special Representative for Trade Negotiations, Mr. Rich-

ard Rivers, addressed to Attorneys Sheldon Cohen and Peter Briger on the subject of foreign oceangoing containers taxed by local governmental units of the State of California. (copy of this letter is also attached).

Washington, D.C., June 15, 1978.

ENCLS.

COPY

The Netherlands Ambassador presents his compliments to the Honourable the Secretary of State and has the honor to draw Mr. Vance's attention to the following matter.

In view of a proposed amendment to the California tax regulations which would enable the State of California and the local county assessors of California to levy a personal property tax on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California, I may draw your attention to the following.

The Government of the Netherlands submits that the imposition of a property tax on aircraft owned by foreign airlines operating into and out of California would directly contravene the United States' treaty obligations set forth in article 24 of the Convention on International Civil Aviation (the so-called "Chicago Convention") and the United States' representations to the other contracting States of the Convention with respect to the exemption from property taxes on aircraft engaged in international air transportation as set forth in the supplement to ICAO document 8632-6/968.

The Government of the Netherlands invites the attention of the Department of State to the language of article 24 of the Chicago Convention which states that "aircraft on a flight to, from, or across territory of another contracting State are to be admitted temporarily free of duty . . . .". In the considered opinion of the Government of the Netherlands, the exemption from "duty" provided by the Convention must necessarily include an exemption from property taxes, whether attempted to be imposed by the United States of America itself or by any individual State or political subdivision thereof. If this were not so, the exemption from "duty" would have little practical value or meaning.

The attention of the Department of State is furthermore drawn to section iii of the ICAO "Council Resolution of 14 November 1966 on taxation of the income of international air transport enterprises and on taxation of aircraft," and particularly clause (1)(b) thereof, which states:

> "(1) *each contracting State shall,* to the fullest extent possible, *grant* reciprocally
>
> > (b) *exemption from property taxes,* and capital levies or other similar taxes, *on aircraft of other contracting States engaged in international air transport* . . ." (emphasis supplied).

In further accordance with this resolution, the Department of State is reminded that each contracting State, including the United States, was to notify ICAO of the extent to which it was prepared to take action in accordance with the principles of this Resolution. In this regard, the United States specifically and unequivocally represented to the other contracting States of ICAO that:

> "the United States in accord with the principles set forth in this clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this clause through bilateral agreements with other countries, or, in appropriate cases, by means of administrative rulings".

The United States' statement then declared that such agreements have been concluded today with several countries. Thus, it is the opinion of the Government of the Netherlands that the United States has already committed itself to a practice of exempting aircraft under foreign flag and which are engaged in international air transportation from the levy of any property tax within the United States.

The Government of the Netherlands would also invite the Department of State's attention to the consideration of various policy factors which are necessarily germane to this issue. First, aircraft operating in international air transportation under the flag of the Netherlands are already subject to full taxation in the Netherlands. Thus, if a property tax were to be imposed by the United States or any individual State or political subdivision thereof, the aircraft would thus be doubly taxed. Such a tax burden is both unfair to the air transport enterprises involved and also a frustrating but preventable, impediment on the smooth development of trade and travel between our two countries. It is indeed the very purpose for which section iii of the ICAO Council Resolution of 14 November 1966 was formulated and approved.

Finally, it seems evident that the imposition of a property tax on the aircraft of non-US airlines operated to or from the United States of America in foreign commerce may lead to the taxation of aircraft of US airlines by foreign Governments and their local political subdivisions.

Once the United States abandons the principle of reciprocal exemption from property taxation of aircraft, there is little reason other Governments will have to refrain from imposing similar, retaliatory property taxes. No one stands to gain from such an escalation of trade barriers as would come about, least of all carriers of the United States which may find themselves with aircraft subject to property tax in many foreign jurisdictions.

The Government of the Netherlands is deeply concerned with the possible international complications which could result if the State of California were to impose a property tax on foreign aircraft operated in foreign commerce. The Government of the Netherlands urges the Government of the United States to take immediate and appropriate action to prevent the imposition of a property tax on foreign-

registered aircraft by the State of California in order to assure continued growth and development of trade and other relations between our two countries.

COPY

Washington, D.C.

June 9, 1978

The Embassy of New Zealand presents its compliments to the Department of State and has the honour to refer to the proposed amendment to the California tax regulations which would enable the State of California to levy a property tax on aircraft owned and operated by foreign airlines engaged in foreign commerce to and from the State of California.

Air New Zealand is designated by the Government of New Zealand to operate from New Zealand via certain intermediate points to Los Angeles, California, pursuant to the provisions of the 1964 New Zealand-United States Air Transport Agreement. Article 7 of that Agreement exempts, on the basis of reciprocity, essential support equipment from customs duties, excise taxes, inspection fees and other national duties or charges. The intent and spirit of this Article is "to prevent discriminatory practices and to assure equality of treatment . . ." and it is the belief of the New Zealand Government that the proposed tax is contrary to that spirit and intent. This would seem to be the view also of the United States Government when it advised ICAO of the extent to which it was prepared to take action in accordance with the principles of Section III of the ICAO Council resolution of 14 November 1966 on Taxation of the Income of International Air Transport Enterprices and on Taxation of Aircraft. That section *inter alia* urges contracting states to grant reciprocally, to the fullest extent "exemption from property taxes, and capital levies or other similar taxes on aircraft of other contracting states engaged in international air transport." The United States stated that it "in accord with the principles set forth in this clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this clause through bilateral agreements with other countries . . ." The United States then included New Zealand in the list of countries with which it had concluded such agreements to grant the exemptions provided in Section III of this resolution, namely exemption *inter alia* of aircraft from property tax.

Furthermore, Article 24(A) of the Convention on International Civil Aviation 1944 specifically requires that aircraft of another contracting state "shall be admitted temporarily free of duty, subject to the customs regulations of the state". Both New Zealand and the United States are parties to the Convention and are bound to observe the obligations imposed by this Article regardless of whether local or national "duty" is involved. In New Zealand's view the word "duty" as used in Article 24(A) is sufficiently wide to cover the proposed property tax and the proviso relating to customs regulations refers only to administrative procedures such as "customs supervision" as is pointed out later on in the same paragraph. This view is confirmed by the 1966 Council resolution referred to above.

The New Zealand Government is concerned that if the State of California is permitted to impose the property tax on aircraft engaged in foreign commerce, the New Zealand Government will have no option but to consider taking appropriate action to ensure that its designated airline is not disadvantaged. The proposed action of the State of California could be responsible for a chain reaction that can only increase airline costs and inevitably lead to significant increases in the fares, rates, and charges for international travel by air between our two countries.

In view of all these considerations the New Zealand Government would appreciate clarification from the Government of the United States as to what action it proposes to take in respect of the property tax on foreign aircraft proposed by the State of California.

The Embassy of New Zealand avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Embassy of New Zealand,
WASHINGTON, D.C.
19 June, 1978

NOTE NO. 153

Her Britannic Majesty's Embassy presents its compliments to the Department of State and has the honour to refer to a circular letter from the California State Board of Equalization dated 24 March 1978 which gives notice of a proposed amendment to the California Tax Regulations. This proposal is intended to enable the State of California and the local county assessors of California to levy property tax ("The Proposed Tax") on aircraft owned and operated by foreign airlines in foreign commerce to and from the State of California.

The Proposed Tax falls within the scope of Article 8(5) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Air Services signed at Bermuda on 23 July 1977, as amended. The Proposed Tax would be a tax imposed by State and local authorities on aircraft operated in international air services by the designated airlines of the United Kingdom and it would not be based on the cost of any services provided. Her Majesty's Government therefore calls on the United States Government to use its best efforts to secure exemption from The Proposed Tax for the designated airlines of the United Kingdom.

In addition, Her Majesty's Government maintain that the imposition on The Proposed Tax would be in contravention of Article 24 of the Convention on International Civil Aviation (the "Chicago Convention") to which the Governments of the United Kingdom and the United States are parties. Article 24 requires aircraft of other Contracting Parties to be admitted temporarily free of duty. This provision must be taken to include exemption from any form of taxation whether levied at the national or state level.

Her Majesty's Government would also draw to the attention of the United States Government Section III of the ICAO Council Resolution of 14 November 1966 on taxation of the income of international air transport enterprises and the taxation of aircraft. Under Paragraph 1(B) of this Section Contracting States are required reciprocally to grant exemption from property taxes on aircraft of other Contracting States engaged in international air transport. The United States Government has represented to the other Contracting States of ICAO that it "has for a long period of time followed the practice of granting . . . through bilateral agreements with other countries or, in appropriate cases, by means of administrative rulings . . . the exemptions provided for" in this Section.

Her Majesty's Government is concerned that if the State of California is permitted to take this action other States may follow suit and that there may be proliferation within the United States of similar local taxes on their designated airlines. No comparable tax is imposed on aircraft of United States designated airlines by any authority within the United Kingdom. Imposition of The Proposed Tax would therefore alter the present position of reciprocity and would lead to an element of double taxation of United Kingdom designated airlines which would disturb the equilibrium of existing and proposed double taxation agreements between our two countries.

In the light of these considerations, Her Majesty's Government would be grateful if they could be informed of what action the United States Government is taking to prevent imposition of a property tax on foreign aircraft by the State of California.

The Embassy avails itself of this opportunity to renew the assurances of its highest consideration.

BRITISH EMBASSY
WASHINGTON, D.C.

7 June 1978

Appendix III

APPENDIX III

Doc 8632-C/968

ICAO'S POLICIES OF TAXATION IN THE FIELD OF INTERNATIONAL AIR TRANSPORT

Approved by the Council on 14 November 1966. Published by direction of the Council.

November 1966

INTERNATIONAL CIVIL AVIATION ORGANIZATION

FOREWORD

The Fifteenth Session of the ICAO Assembly (Montreal, June/July 1965) adopted Resolution A15-16 as follows:

> "WHEREAS it is important that every effort be made to facilitate the operation of international air services as far as different kinds of taxation are concerned;
>
> THE ASSEMBLY RESOLVES that, in carrying out the work programme of the Organization in the air transport field, the Council shall review the compliance with its resolutions and recommendations dealing with the problems of the avoidance of multiple taxation and explore, if necessary, on the basis of the latest information from the Contracting States the possibility of a new initiative in this field."

During the 56th Session, the Council requested the Air Transport Committee to review the above mentioned 1951 Resolutions/Recommendations and the status of their implementation in the light of the latest information from Contracting States, and to make appropriate recommendations to Council on taxation in the field of international

air transport. The 1951 Resolutions/Recommendation dealt with:

i) taxation of fuel, lubricants and other consumable technical supplies when an aircraft registered in one State arrives in or departs from a customs territory of another State;

ii) taxation of fuel, lubricants and other consumable technical supplies consumed between two or more landing points within the same customs territory;

iii) taxation of the income and flight equipment of international air transport enterprises;

iv) taxes related to the sale or use of international air transport.

Accordingly, the Committee during the 58th and 59th Sessions of Council, undertook a comprehensive review of all aspects related to this subject matter.

Acting on the Committee's resultant recommendations, the Council, at the fourth meeting of its 59th Session, on 14 November 1966, decided to re-cast the Resolutions and the Recommendations, taking into account developments since 1951, while reaffirming at the same time their underlying principles, to publish them in this policy document for action by Contracting States and to provide certain explanatory material herein for guidance to States and international operators.

SECTION III

COUNCIL RESOLUTION OF 14 NOVEMBER 1966 ON TAXATION OF THE INCOME OF INTERNATIONAL AIR TRANSPORT ENTERPRISES AND ON TAXATION OF AIRCRAFT

WHEREAS multiple taxation of the earnings of international air transport enterprises and of aircraft engaged in international air transport can be effectively prevented

by the reciprocal agreement of States to limit taxation in these two fields to the State in which any such enterprise has its fiscal domicile; and

WHEREAS for international air transport enterprises lack of implementation of this rule of reciprocal exemption involves either multiple taxation or considerable difficulties of income allocation in a very large number of taxing jurisdictions; and

WHEREAS such exemptions have already been widely obtained, for example, through the inclusion of appropriate provisions in bilateral agreements aimed at avoidance of multiple taxation generally or in those dealing with the exchange of commercial air transport rights or through individual States adopting legislation which grants the exemption to any other States that provide reciprocity;

THE COUNCIL RESOLVES THAT:

(1) Each Contracting State shall, to the fullest possible extent, grant reciprocally

(a) exemption from taxation on the income of air transport enterprises of other Contracting States derived in that State from the operation of aircraft in international air transport; and

(b) exemption from property taxes, and capital levies or other similar taxes, on aircraft of other Contracting States engaged in international air transport;

(2) Each Contracting State shall endeavour to give effect to paragraph (1) above, by the bilateral negotiation of agreements relating to double taxation generally, or by such other methods as the inclusion of appropriate provisions in bilateral agreements for the exchange of commercial air transport rights, or by legislation granting such exemption tr any other State that provides reciprocity;

(3) Each Contracting State shall take all feasible measures to avoid delays in any bilateral negotiations found necessary to achieve implementation of Clause (1) above;

(4) Each Contracting State shall notify the Organization of the extent to which it is prepared to take action in accordance with the principles of this Resolution and thereafter keep the Organization informed of any subsequent changes in its position vis-a-vis the Resolution;

(5) The information thus received shall be published and transmitted to all Contracting States.

COMMENTARY ON COUNCIL RESOLUTION IN SECTION III

21. This Resolution aims at the avoidance of multiple taxation in so far as it affects the earnings of and the fleet engaged in international air transport, e. g., income taxes on profits, and movable property or similar taxes on aircraft. The Council, for reasons similar to those given in the foregoing Resolution and Recommendation on taxation of fuel, lubricants and other consumable technical supplies, based the Resolution upon the principle of reciprocity. This approach appeared to offer the best prospect of general acceptance, has been widely applied to international shipping for many years, and has already been put into effect in many instances either through appropriate legislation in individual States or through bilateral agreements of one sort or another between States.

22. It will be noted in this connection that the conclusion of such agreements is consistent with the recommendation of the Economic and Social Council of the United Nations to the effect that governments should actively pursue a policy of negotiating agreements with each other for the avoidance of multiple taxation.

23. Furthermore, both this reciprocal approach and the method used for avoidance of multiple taxation for the items under consideration have been contained in model bilateral conventions, e. g., those of Mexico (1943) and London (1946), in which tax experts from large and small, developed and developing States participated. It was recognized by those who developed these model tax agreements that international water and air transport enterprises were essentially different from other types of business enterprises which do not generally operate with great mobility in a multiplicity of jurisdictions and on or above the high seas.

24. The Resolution. when fully implemented by all Contracting States, would mean that taxes on the earnings and fleet of an international air transport enterprise would be levied solely by the State where the place of effective management of the enterprise is located. In the absence of reciprocal exemptions, an international air transport enterprise is either subject to multiple taxation—a situation which this Resolution endeavours to prevent—or to assessments on the basis of one or the other allocation formula to be negotiated between the operator and the State concerned. The only possible alternative, i. e., allocation on a multilateral basis, in Council's view, remains a theory which conceivably might be more equitable provided every State in the world would agree to commit itself to the formula devised. This appears precluded in the foreseeable future by: a) fundamental differences between jurisdictions, in tax structure, revenue needs and economic conditions, as well as by differences in language, business and accounting practices and fiscal and commercial legislation, and (b) the freely admitted desire of the operators of international flights, in cases where the rule of reciprocal exemption is not followed with respect to taxes on their income or movable property taxes on their aircraft, to maintain flexibility by utilizing different formulae in different circumstances.

25. In giving effect to this Resolution, various courses of action, as mentioned in the third WHEREAS clause, are open to Contracting States. Of these, the adoption of legislation granting exemption on a reciprocal basis, is undoubtedly the most simple and least time consuming method of achieving the aim of this Resolution, provided that such legislation can be enacted without undue delays. Some States, on the other hand, find it more practicable to deal with the problem of relief from multiple taxation of air transport enterprises through formal bilateral negotiations of agreements relating to taxation generally or in the context of agreements for the exchange of commercial air transport rights. In some instances, however, negotiations conducted between certain States to this end are known to have encountered numerous formal difficulties and delays, as a result of which Council has invited (cf. third resolving clause) negotiating governments to take all feasible measures to achieve rapid implementation. In this connection, the attention of governments is drawn to a method of implementation that has been utilized between certain States. Having decided, in principle, to apply the rule of reciprocal exemption to each others' air transport enterprises, the States concerned have completed action on the matter by means of a simple exchange of diplomatic notes. A wider application of this type of action, where possible and appropriate, might assist in the early achievement of more universal application of the rule of reciprocal exemption.

26. As in the previous Resolution and Recommendation on fuel and lubricants, the Council again has urged States (cf. Resolving Clauses (4) and (5) to notify the Organization of their position vis-a-vis items a) and b) on the first resolving clause so that an up-to-date record may be maintained in a Supplement to this document.

SUPPLEMENT TO DOC 8632-C/968 ICAO'S POLICIES ON TAXATION IN THE FIELD OF INTERNATIONAL AIR TRANSPORT

Information reflecting the status of implementation in Contracting States of Council's 1966 Taxation Resolutions and Recommendation as notified to ICAO.

Approved by the Council and published by its decision

Incorporating all the information relating to Doc 8632-C/968 as notified to ICAO up to the date shown in the Table of Contents.

1967

INTERNATIONAL CIVIL AVIATION ORGANIZATION

REPLY OF THE UNITED STATES

Section III, Resolution

Clause (1) The United States is in accord with the principles set forth in this Clause and, in accordance with its existing laws, has for a long period of time followed the practice of granting the exemptions provided for in this Clause through bilateral agreements with other countries, or, in appropriate cases, by means of administrative rulings.

Clause (2) Such agreements have been concluded to date with the following countries:

Antigua; Argentina; Australia; Austria; Barbados; Belgium; Brazil; Canada; Colombia; Congo; Democratic Republic of Curacao; Denmark; Finland; France; Germany, Fed. Rep. of; Ghana; Greece; Honduras; Iceland; Indonesia; Iran; Ireland; Italy; Jamaica; Japan; Kenya; Lebanon; Liberia; Luxembourg; Mexico; Netherlands, Kingdom of the; New Zealand; Nigeria; Norway; Pakistan; South Africa; Spain; Sweden; Switzerland; Syria; United Arab Republic; United Kingdom; Uruguay.

No. 77-1378

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAPAN LINE, LTD., ET AL., APPELLANTS

v.

COUNTY OF LOS ANGELES, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
M. CARR FERGUSON,
Assistant Attorneys General,

KENT L. JONES,
Assistant to the Solicitor General,

LEONARD SCHAITMAN,
ERNEST J. BROWN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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v.

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ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation of June 12, 1978.

QUESTION PRESENTED

Whether freight containers owned by Japanese shipping companies, carried in Japanese vessels engaged in commerce between the United States and Japan with their home port in Japan, intermittently in the United States to unload and load freight carried in foreign commerce, may be subject to personal

property taxes imposed by municipalities in the State of California.

STATEMENT

Appellants are Japanese shipping corporations, which have their principal places of business and commercial domiciles in Japan. They operate vessels used exclusively in foreign commerce. The vessels are registered in Japan and have their home ports in Japan. These vessels are designed and constructed to accommodate large shipping containers, and all cargo is brought onto the vessel, stored during transit, and removed at destination in these containers. The containers, which are owned by appellants, have their home port in Japan and are used constantly and exclusively for the transportation of cargo for hire in foreign commerce. Each container is in constant transit save for repair time and time awaiting the loading of cargo. All of the containers owned by appellants are subject to property tax in Japan and are in fact taxed in Japan (J.S. App. 2a-3a, 17a-18a).

A number of appellants' containers were present in the County of Los Angeles and the City of Los Angeles on the dates used by appellees for tax computation purposes.[1] None of these containers had been in California for as much as six months during the twelve months immediately preceding those dates. The average stay of the containers in California was less than three weeks (J.S. App. 2a-3a, 15a-16a, 18a). The fair market values of the containers present in the County and City of Los Angeles on the critical date of the years in question ranged from a low of $553,200 in the case of Showa Shipping Co. in 1971 to a high of $1,768,280 in the case of Kawasaki Kisen Kaisha, Ltd., in 1972. The County of Los Angeles and the City of Los Angeles levied the state property tax with respect to the assessed value of these containers.[2] The taxes for 1970 through 1972 were: Japan Line, Ltd., $100,632.85; Kawasaki Kisen Kaisha, Ltd., $117,616.44; Mitsui O.S.K. Lines, Ltd., $111,255.25; Nippon Yusen Kaisha, $110,175.04; Showa Shipping Co., $50,640.69; Yamashita-Shinnihon Steamship Co., Ltd., $69,416.39. Appellants paid the taxes under protest and filed a suit for refund in state court (J.S. App. 15a-17a).

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[1] Property present in California on March 1 of any year is subject to tax in the State. See California Revenue and Taxation Code, Sections 117, 405, and 2192 (West. 1970). This roughly apportions the property tax for mobile goods such as containers. Although no container is present in California consistently, some containers are there at any time. For example, if each container is present in California for approximately three weeks each year, the number of containers present in California on any arbitrarily selected date is approximately 3/52 of the total number of containers that enter California at any time during the year. The number of containers physically present in Los Angeles County on March 1 of 1970, 1971, and 1972, was representative of the number of containers present in Los Angeles County on other dates throughout the tax year.

[2] The property tax rate applied to the containers during the years involved in this case was approximately 11% of assessed value, and the assessed value of the property ordinarily is 25% of fair market value. See J.S. App. 16a.

The superior court held that the containers in question were instrumentalities of foreign commerce and therefore, under the "home port" rule of *Hays* v. *Pacific Mail Steamship Co.*, 58 U.S. (17 How.) 596 (1855), were immune from property taxation except in Japan (J.S. App. 26a-27a). The court also held (*id.* at 27a-28a) that imposition of the property tax by the County and the City was inconsistent with the provisions of the Treaty of Friendship, Commerce and Navigation Between the United States and Japan (4 U.S.T. 2063).[3]

The court of appeal, following the decision in *Sea-Land Service, Inc.* v. *County of Alameda*, 12 Cal. 3d 772, 528 P.2d 56 (1974), a case involving a domestic carrier, rejected the "home port" rule as anachronistic and held that instrumentalities of foreign commerce are subject to apportioned property taxation (J.S. Supp. SA 5). The court also rejected the contention that property taxes on sea-borne containers temporarily off-loaded by vessels in foreign commerce constitute a duty of tonnage that is prohibited by Article I, Section 10, cl. 3 of the Constitution (J.S. Supp. SA 4-SA 6). Finally, the court concluded that the treaty provisions invoked by appellants have no application to state or local property taxation of instruments of foreign commerce (J.S. Supp. SA 6-SA 9). The court of appeal therefore reversed the judgment of the superior court (J.S. Supp. SA 9).

[3] The superior court relied principally on Article XI of the Treaty, which provides that nationals of the contracting parties are not to be assessed taxes "within the territories of such other Party, [that are] more burdensome than those borne by nationals and companies of such other Party." 4 U.S.T. at 2072.

The Supreme Court of California affirmed the decision with some expansion and editorial emendations as its own opinion (J.S. App. 1a-13a).

SUMMARY OF ARGUMENT

The question in this case is whether the State of California or its cities and counties constitutionally may impose an annual ad valorem property tax on cargo containers owned by Japanese shipping lines, based and taxed in Japan, carried on Japanese ships engaged in commerce between Japan and the United States, and briefly in California for the sole purpose of discharging and loading cargo carried in foreign commerce by those ships.

In the view of the United States, they may not. This Court has long recognized that the Commerce Clause commits to the exclusive authority of the national government the regulation of those aspects of interstate and foreign commerce that, by their nature, require uniform national treatment. See, *e.g.*, *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851). We believe that foreign-owned and foreign-domiciled instrumentalities of foreign commerce should be accorded uniform tax treatment. The necessary uniformity is supplied by this Court's decision that only the "home port" may impose ad valorem property taxes on sea-going ships. *Hays* v.

Pacific Mail Steamship Co., 58 U.S. (17 How.) 596 (1855).

The "home port" rule should apply to containers as well as to ships. The development of the container and the container-ship is one of the major advances in the technology of transportation, and the container has assumed a character as an instrument of commerce identical to the ship itself. It completes the voyage in foreign commerce not at the water's edge but only when it discharges the cargo that it carries. The United States recognizes the status of the container as comparable to that of a ship by adhering to the Customs Convention on Containers, 20 U.S.T. 301, whereby containers are admitted into the signatory nations for limited periods free of custom duties and restrictions. Neither the courts below nor the appellees have regarded the containers as different from the ships that carry them. Indeed, the California State Board of Equalization has proposed, as a result of the decision of the Supreme Court of California in this case, to impose its property tax on foreign aircraft arriving in California and operating solely in foreign commerce (App., *infra*, 1a-11a).

It is true that this Court recently has permitted non-domiciliary states to impose ad valorem property taxes on railroad rolling stock, vessels on inland waterways, and aircraft of domestic airlines, when the taxes were apportioned to reflect the extent to which the property was present in the taxing state. But in each case the Court observed that its decision did not relate to ocean-going vessels. The Court's

recent decisions not only leave unquestioned *Hays* and other decisions regarding the taxation of sea-going vessels but also hold that a system that permits imposition of apportioned property taxes by non-domiciliary states is not consistent with taxation of the full value of the property by domiciliary states. Because foreign nations have the power and right recognized by the custom of nations to tax the full value of the ships and containers of their nations, no system of apportionment can prevent multiple taxation. Any rule allowing property taxes to be collected by non-domiciliary jurisdictions would lead to multiple tax burdens and thus disadvantage one form of commerce solely because it is foreign.

This Court has not been reluctant to hold inoperative state statutes having impact upon foreign nationals or foreign commerce where it has perceived friction with federal policy or federal interests. We are informed by the Department of State that six foreign nations have expressed concern about California's tax on containers. See App., *infra*, 15a. Even more have raised questions about the State's proposal to impose its property tax on foreign airplanes. *Ibid.* If these expressions of concern are followed by action by nations feeling themselves disadvantaged, as we must anticipate they may be, the responsive action will affect not only California but also the United States.

Moreover, the action of California and the appellees in this case lessens the effectiveness of the Customs Convention on Containers in aiding foreign commerce

and interferes with the comprehensive scheme of federal regulation of instrumentalities of foreign commerce. The state tax thus constitutes an obstacle to the realization of the foreign policy of the United States. It intrudes, as the voice of one of 50 states, into an area where the United States has spoken and should continue to speak with one voice.

ARGUMENT

THE COMMERCE CLAUSE AND THE SUPREMACY CLAUSE DEPRIVE THE STATES OF AUTHORITY TO LEVY AD VALOREM TAXES ON FOREIGN-OWNED AND FOREIGN-DOMICILED SEA-BORNE CONTAINERS.

A. The "Home Port" Rule

In *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851), this Court for the first time dealt explicitly with the question (53 U.S. (12 How.) at 318) "whether the grant of the commercial power to Congress, did *per se* deprive the states of all power" to deal with foreign and with interstate commerce. The Court's response demonstrated the difficulties of giving an unvarying answer (*id.* at 319):

> Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. * * *

The *Cooley* formulation has at times been phrased somewhat differently (see *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775-776 (1945)), but in every case where the impact of a state statute on interstate or foreign commerce has drawn into question the constitutional validity of the statute, the Court has appraised the federal interest and the degree of state interference before giving a constitutional answer.[4]

Soon after the decision in *Cooley*, this Court held in *Hays* v. *Pacific Mail Steamship Co., supra*, that California could not impose its property tax on an ocean-going vessel that was engaged in interstate and international commerce and that stopped in California ports to unload and load mail, passengers, and freight, and for repairs and refitting. The Court observed that the vessel was owned and registered in another state and that, while engaged in interstate and foreign trade, the vessel could not be regarded as "abiding within [the] limits [of California] so as to be-

[4] In *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28 (1948), for example, the Court found that an equal-accommodation statute of the State of Michigan could be applied to a vessel transporting passengers between Detroit and a nearby amusement park on Canadian soil. This was because, in the unusual circumstances of the case, there was "nothing out of harmony, much less inconsistent, with our federal policy in the regulation of commerce between the two countries; nor, so far as we are advised, with Canadian law and policy." *Id.* at 37. The Court was nevertheless careful to recognize that "we must be watchful of state intrusion into intercourse between this country and one of its neighbors." *Id.* at 35.

come incorporated with the other personal property of the state * * *." *Id.* at 599. Although California could impose "municipal and sanitary regulations * * * not inconsistent with the constitution and laws of the general government" (*ibid.*), the Court held that only the home port could impose a property tax. Accord, *Southern Pacific Co.* v. *Kentucky*, 222 U.S. 63 (1911); *Morgan* v. *Parham*, 83 U.S. (16 Wall.) 471, 477 (1872).

Although, as we discuss at pages 15-17, *infra*, this Court has held, with respect to various forms of domestic commerce, that the states may levy "apportioned" property taxes—that is, taxes fairly reflecting the extent to which particular transient property actually is present in a state—it has been careful in each case to exclude sea-borne transport from its holding. We believe that *Hays* continues to state a sound principle which rests on the uniform practice of nations and protects the federal interests in the regulation of sea-borne commerce, particularly in commerce with foreign nations, and in speaking with one voice in matters affecting our foreign relations. See *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976). As we shall indicate, the imposition of the tax by appellees entails substantial intrusion on these interests. We turn first, however, to consider the specific property involved, appellants' containers.

B. Appellants' Containers, Like The Ships That Carry Them, Are Instruments Of Foreign Commerce

In the technology of sea-borne transportation in recent decades, the container and the container-ship stand out as among the most significant developments:

> One of the most important technological developments in the transportation of goods by sea since steam replaced sail is the recent advent of the "container revolution". This radically novel concept of transferring, handling, stowing, discharging and delivering hundreds of packages simultaneously and mechanically by means of large reusable permanent metal containers, containerships, special container handling equipment and container terminals is so efficient a labor-saving device that it has already, to a large extent, altered conventional methods of shipping large numbers of packages individually. In short, containerization has rendered shipping "a whole new ball-game".

Simon, *The Law of Shipping Containers*, 5 J. Mar. L. Com. 507 (1974). Containers of the type involved in this litigation are not merely packages to contain goods, but are "a permanent, reusable article of transport equipment * * *." *Id.* at 513. A container is (*ibid.*)

> durably made of metal, and equipped with doors for easy access to the goods and for repeated use. It is designed to facilitate the handling, loading, stowage aboard ship, carriage, discharge from ship, movement, and transfer of large

> numbers of packages simultaneously by mechanical means to minimize the cost and risks of manually processing each package individually. It functions primarily as ship's gear for cargo handling, and is usually provided by the carrier.

As this Court put it, "the container is a modern substitute for the hold of the vessel." *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 270 (1977). The Court held in *Caputo* that loading and unloading a container is the same thing as loading and unloading the ship itself, thus establishing that a container is "functionally a part of the ship * * *." *Leather's Best, Inc.* v. *S. S. Mormaclynx*, 451 F.2d 800, 815 (2d Cir. 1971).

The container, just as the ship, is continuously engaged in foreign commerce from the time its cargo is loaded and movement starts until its cargo is discharged at destination. As the superior court observed (J.S. App. 26a), the containers involved in this case "only come into this country for the purpose of bringing in cargoes or shipping them out in foreign commerce. There is no interstate or intrastate use." And the Supreme Court of California acknowledged (*id.* at 2a) that "[t]hey are used exclusively for the transportation of cargo for hire in foreign commerce." [5]

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[5] This Court recognized as early as 1824, in the seminal opinion of Chief Justice Marshall in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 195, that foreign commerce "does not stop at the jurisdictional lines of the several States" but proceeds within the states until the movement in commerce is completed. See also *Henderson* v. *Mayor of New York*, 92 U.S. 259, 271 (1875).

The United States, in common with many other nations, recognizes containers as instruments of foreign commerce integral to the ships that carry them. Chapter II, Article 2 of the Customs Convention on Containers, 20 U.S.T. 301, 304, provides for the "temporary admission [of sea-borne containers] free of import duties and import taxes and free of import prohibitions and restrictions" when they are imported for use solely in foreign commerce and subject to reexportation. Similarly, 19 C.F.R. 10.41a(a)(3)[6] designates sea-borne containers as "instrumentalities of international traffic" within the meaning of 19 U.S.C. 1322. Pursuant to these regulations and Section 1322, containers may be bonded and "released without entry or the payment of duty" so long as they are used exclusively in foreign commerce and subject to reexportation. 19 C.F.R. 10.41a(a)(1), (c). In a number of bilateral income tax conventions, including the Convention Between the United States of America and Japan, 23 U.S.T. 967, 987, 1084, and 1093, the United States further associates containers with the ships that carry them by providing that the income from the use of containers and related equipment in international traffic shall be treated in the same fash-

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[6] 19 C.F.R. 10.41(a)(3) provides:

> As used in this section, "instruments of international traffic" includes the normal accessories and equipment imported with any such instrument which is a "container" as defined in Article 1 of the Customs Convention on Containers.

ion as income from the ships in connection with which they are used.

Neither the court below nor appellees have sought to treat the appellants' containers as other than instrumentalities of foreign commerce or to differentiate them in any fashion from the ships that were designed and constructed to carry them. Indeed, after the decision of the Supreme Court of California in this case, the California State Board of Equalization gave notice of public hearing on its proposal to amend the California Administrative Code to make foreign aircraft operated solely in foreign commerce subject to property taxation in California. App., *infra*, 1a-11a. The notice of public hearing was cancelled, subject to possible rescheduling, only after this Court set the present case for oral argument (*id.* at 12a-13a).

For these reasons, we believe that the question of the states' constitutional power to tax appellants' containers is not distinct from the question of their power to tax the vessels on which the containers are carried.

C. Imposition Of The Ad Valorem Tax On Appellants' Ships Or On The Containers Carried In Them Is Inconsistent With The Exclusive Authority Of The Federal Government To Regulate Foreign Commerce

As we have noted, this Court held in *Hays* v. *Pacific Mail Steamship Co., supra*, in *Morgan* v. *Parham, supra* and in *Southern Pacific Co.* v. *Kentucky, supra*, that only the home port, or the jurisdiction in which it is located, may impose a property tax on ocean-going ships. Other ports in which those ships may be found from time to time may not constitutionally impose a general property tax on the vessels. Those decisions, expressing the mandate of the Constitution, express as well the custom of nations. We are informed by the Department of State that after inquiry of its posts abroad, it determined that only one nation, Afghanistan, imposes property taxes on foreign containers or other instruments of foreign commerce entering its jurisdiction (App., *infra*, 14a). All other nations have adhered to the international custom of allowing containers, as well as vessels and other instruments of foreign commerce, to be introduced for the exclusive purpose of conducting such commerce free of all customs duties and general taxes, including property taxes.[7] Cf. 19 U.S.C. 1322; 19 U.S.C. 1202 (General Note 5(e)). Although positive law may override international customs that bear on ships and instruments of commerce of other nations, see *The Exchange*, 11 U.S. (7 Cranch) 116, 136, 144 (1812), such law can be enacted only at the national level if the nation is to speak with one voice in matters of foreign commerce.

It is true that, with respect to the several forms of inland transportation, this Court has held that instrumentalities of interstate commerce are subject

[7] "Fees" that are related to the value of specific services provided to vessels and containers, as opposed to general taxes to support the operations of government (see *National Cable Television Association* v. *United States*, 415 U.S. 336, 340-341 (1974)), are, however, permissibly charged under the custom of nations. See App., *infra*, 14a-15a. Cf. *Hays* v. *The Pacific Mail Steamship Co., supra*, 58 U.S. (17 How.) 596; *Packet Co.* v. *Keokuk*, 95 U.S. 80, 88-89 (1877).

to apportioned property taxation by the states in which they operate. But in each instance it has been careful to state that its decision did not involve foreign or ocean-borne commerce. In *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U.S. 18, 23-24 (1891), upholding apportioned property taxation of railroad rolling stock engaged in interstate commerce, the Court explicitly differentiated the case of ships and vessels upon the high seas. Quoting from *Railroad Co.* v. *Maryland,* 88 U.S. (21 Wall.) 456, 470 (1874), the Court pointed out (141 U.S. at 24) that:

> Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land.

Similarly, when the Court upheld apportioned property taxation of barges on the Mississippi River by non-domiciliary states in *Ott* v. *Mississippi Barge Line,* 336 U.S. 169 (1949), it was careful to point out that "[w]e do not reach the question of taxability of ocean carriage but confine our decision to transportation on inland waters." *Id.* at 173-174. And in *Braniff Airways, Inc.* v. *Nebraska State Board,* 347 U.S. 590 (1954), upholding Nebraska's apportioned property taxation of the aircraft of an airline domiciled in another state, the Court differentiated the "home port" rule in *Hays* and other decisions involving sea-borne transportation, remarking (347 U.S. at 600):

> A closer analogy exists between planes flying interstate and boats that ply the inland waters. We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats. *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U.S. 169 * * *.

But the Court has done more than leave *Hays* and companion decisions unquestioned. It has held in *Standard Oil Co.* v. *Peck,* 342 U.S. 382 (1952), that its decisions upholding apportioned property taxation of vessels on inland waters, and of aircraft of domestic airlines engaged in interstate flights, necessarily entailed disapproval of taxation of the full value of those instrumentalities of interstate commerce by the jurisdictions of the domicile or home base of the owner (*id.* at 384): "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile." Accord, *Braniff Airways, Inc.* v. *Nebraska State Board, supra,* 347 U.S. at 601-602. In other words, one of the foundations for the Court's approval of apportioned property taxation has been its ability to enforce full apportionment by *all* of the potential taxing bodies, so that no property was subject to multiple taxation on its full value.

But neither the Court nor the United States as a whole can ensure full apportionment when one of the

taxing bodies is a foreign nation. We deal here with ships, and containers, owned by Japanese corporations, based in Japan, subject to property taxation in Japan, and in fact taxed in Japan (J.S. App. 18a). As the superior court pointed out (*id.* at 28a): "There is no way to prorate the [taxes on this property], as we do in interstate commerce. The Japanese would be paying a double tax, while a domestic company would, by reason of proration, be paying only one tax." The multiple burden that unapportioned taxation places on foreign-owned instruments of foreign commerce is thus a reality and not merely "an abstraction." *Department of Revenue* v. *Association of Washington Stevedoring Companies*, No. 76-1706 (April 26, 1978), slip op. 11 (hereafter *Washington Stevedoring*).[8] Only the application of the "home port" rule

[8] In *Washington Stevedoring* this Court upheld application of a general state occupations' tax to stevedoring. The Court stated that, because the incidence of the tax was on stevedoring services performed wholly within one state, "the tax is properly apportioned and multiple burdens logically cannot occur." Slip op. 11. In this case, however, the incidence of the tax is on property employed as an instrumentality of foreign commerce that comes within the jurisdiction of several nations. Each nation may claim a right to tax all or part of the property value. Moreover, in *Washington Stevedoring* the Court was careful to observe that the tax on stevedoring did not interfere with our foreign relations because it was applied to services performed wholly in the State of Washington and was not assessed against any "foreign business or vessel * * *." *Id.* at 19. The tax involved in this case has directly affected our foreign relations by its application to foreign-owned instruments of foreign commerce. See pages 20-22, *infra*.

can make our practice consistent with that of other nations and avoid a multiple tax burden on foreign commerce that domestic commerce does not share.

This Court has held that a state tax or regulation that disadvantages interstate or foreign commerce simply because it is interstate or foreign interferes with the exclusive national authority to regulate such commerce and is thus invalid under the Supremacy Clause. See *Washington Stevedoring*, *supra*, slip op. 15; *EVCO* v. *Jones*, 409 U.S. 91, 93-94 (1972); *Harvester Co.* v. *Department of the Treasury*, 322 U.S. 340, 349, 358-362 (1944) (Rutledge, J., concurring); *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-256 (1938). The Supreme Court of California reasoned in this case, however, that the double taxation of foreign-owned containers that results from the state scheme is "not attributable to * * * the taxing state" but instead to the foreign state, and that it can be alleviated by "international agreement" (J.S. App. 6a). But the state cannot dictate to the United States or to foreign nations how to agree on matters of foreign policy or foreign commerce; nor can the national government unilaterally impose international agreements on foreign nations.[9] The state tax must thus be evaluated within the realistic framework of the custom of nations; it is within that framework that the state tax creates an imper-

[9] Nothing could prohibit the Government of Japan from taxing its nationals and corporations on the full value of their property, and it now does so.

missible multiple burden on foreign-owned instruments of foreign commerce.[10]

If it were thought that treaties could or should be adopted to establish systems of apportioned taxation of property in international commerce, this would, of course, be a matter of national, not state concern. We are informed by the Department of State that six foreign governments, including some of our most important trading partners, have written to the Department expressing concern about the effect on foreign commerce of the California container tax (App., *infra*, 15a). In addition, 12 countries have sent diplomatic notes concerning the stated intention of

[10] The discriminatory burden of the state's tax on foreign-owned instrumentalities of foreign commerce is sufficient by itself to invalidate the tax under the Commerce Clause. We note, however, that it appears that the tax, as applied to foreign-owned containers, may be invalid for the additional reason that it is not fairly related to the services provided by the State. Although the factual record in this case is inadequate to support firm conclusions, it seems implicit from the findings of the superior court (J.S. App. 16a-19a) that, for the large part of their presence in this country, the containers taxed in this case are located at the wharf or in related dockside facilities. While they are thus located, they are subject to ordinary wharfage or dockage fees assessed as compensation for services actually provided by the State. See California Harbors and Navigation Code, Section 4122 (West. 1978); Appellants' Br. 46-47. Additional general taxation on an ad valorem basis could thus subject the containers to taxation by the State twice under the same theory for the same services. The case is thus distinct in this regard from the general occupations tax upheld in *Washington Stevedoring*, *supra*, and the general ad valorem tax upheld in *Michelin Tire Corp.* v. *Wages*, *supra*, where no double taxation by the assessing state was involved.

the State of California (*id.* at 1a-11a) to permit local personal property taxation of foreign flag aircraft flown to and from California in foreign commerce (*id.* at 15a). These expressions of concern over action disadvantageous to our trading partners may be followed, if they produce no satisfactory response, by other action. If the California tax should lead to responsive actions (say, the imposition of countervailing taxes) by nations deeming themselves disadvantaged, it could be anticipated that the responsive action would be not to California, or to California interests alone, but to the interests of the United States.[11]

This case thus falls within the scope of the rule, stated in *Moorman Manufacturing Co.* v. *Bair*, No.

[11] This Court recognized an analogous situation in *Chy Lung* v. *Freeman*, 92 U.S. 275 (1875). California had detained a number of immigrant passengers on a ship from China because of their failure to give bond, required by a California statute, intended to indemnify counties, towns, and cities against liability for their support or maintenance for two years. In holding that the Constitution prohibited California's scheme, the Court pointed out (*id.* at 279):

> * * * [I]f this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?

77-454 (June 15, 1978), slip op. 12, that "the freedom of the States to formulate independent policy in [the] area [of commerce] may have to yield to an overriding national interest in uniformity * * *." "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). The taxation of foreign-based instruments of foreign commerce is thus a matter that is subject only to a national rule conformable with the practice of nations or adopted pursuant to the authority of the federal government.

D. Imposition Of The Tax On Appellants' Ships Or The Containers Carried In Them Interferes With The Objectives Of The Customs Convention On Containers And The Comprehensive Scheme Of Federal Regulation Of Instrumentalities Of Foreign Commerce

The Commerce Clause affords Congress the power to "regulate commerce with foreign nations, and among the several States * * *." Although a state may, in some circumstances, take action that affects foreign or interstate commerce, a state may not intrude in an area where there is pervasive federal regulation. *Ray* v. *Atlantic Richfield Co.*, No. 76-930 (March 6, 1978); *Campbell* v. *Hussey*, 368 U.S. 297, 300 (1961). Nor may a state take action that defeats the objectives of federal regulation. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 229-230 (1947). In the instant case, a comprehensive arrangement of federal regulation has been adopted;

this arrangement precludes general state taxation [12] of foreign-owned instruments of foreign commerce, and of sea-borne containers in particular.[13]

Article 2 of the Customs Convention on Containers requires the United States to grant "temporary admission free of import duties and import taxes and free of import prohibitions and restrictions * * * to containers" used exclusively in international commerce. 20 U.S.T. at 304.[14] Article 1(a) of the Con-

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[12] Tolls and fees charged in connection with specific services rendered by the states to instruments of foreign commerce are not affected by the federal scheme. See note 7, *supra*. Cf. *Transportation Co.* v. *Parkersburg*, 107 U.S. 691, 696 (1882). Nothing in our argument or in the Court's cases would prevent the states from collecting wharfage fees and other similar user charges.

[13] Appellants argue (Br. 32) that Article XI of the Treaty of Friendship, Commerce and Navigation Between the United States and Japan (4 U.S.T. 2063) prohibits application of the state tax to their containers. The United States does not support this contention. Article XI states only that nationals of the contracting parties are not to be assessed taxes "within the territories of such other Party, [that are] more burdensome than those borne by nationals and companies of such other Party." 4 U.S.T. at 2072. This provision guarantees that the United States will not levy on Japanese nationals, "within the [United States]," taxes that exceed those that it levies on its own nationals. The treaty does not purport to equalize world-wide tax burdens; so long as appellants are not treated differently from United States citizens under domestic tax statutes, the treaty has no application.

[14] Under Article 11 of the Customs Convention on Containers, 20 U.S.T. at 308, containers that are used "even occasionally" for domestic traffic while in a foreign nation may be subjected to duties and taxes within that nation.

vention provides that "the term 'import duties and import taxes' shall mean not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation." *Ibid.* The obligations of the United States under the Convention are implemented by regulations (19 C.F.R. 10.41a) adopted by the Secretary of the Treasury pursuant to Section 322(a) of the Tariff Act of 1930, 19 U.S.C. 1322(a). This statute authorizes the Secretary to grant the "customary exceptions from the application of the customs laws" to "[v]ehicles and other instruments of international traffic."

Under the Secretary's regulations and the Customs Convention itself, the United States allows the temporary admission of containers without formal entry into the commerce of the United States,[15] and without payment of duty, when the containers are being used exclusively in international commerce. Customs Convention on Containers, Articles 3, 11, 20 U.S.T. at 306, 308; 19 C.F.R. 10.41a(a)(1), (c), (f).[16] Admission is conditioned, however, on payment of a bond (1) to secure compliance with the requirement

[15] All imported articles (with certain specified exceptions) must be formally entered into the commerce of the United States within five days of arrival in a port of the United States. 19 U.S.C. 1484.

[16] Reexportation may be excused because of damage to the container or at the election of the owner. However, customs duties will then become applicable (Customs Convention on Containers, Article 4, 20 U.S.T. at 306) and the container must then be formally entered into commerce under 19 U.S.C.1484. See note 15, *supra.*

that the containers be reexported and (2) to ensure that the container is used exclusively for foreign commerce. 19 C.F.R. 10.41a(c). See note 14, *supra.* The effect of granting temporary admission in a bonded status for containers used exclusively in foreign commerce is to preclude these articles from entering the commerce of the United States. The containers cannot be used for the transportation of goods in interstate commerce or be sold or used in domestic commerce without losing their status as "instruments of international traffic" and becoming subject to formal entry and the assessment of duties. 19 C.F.R. 10.41a(d).[17]

In allowing the temporary admission of such articles under bond and without formal entry into the commerce of the United States, the national government has given to "instruments of international traffic," and to shipborne containers in particular, the same status it gives under the customs laws to articles admitted to a "bonded manufacturing warehouse." 19 U.S.C. 1311. Under the analogous "bonded warehouse" provision, articles may be admitted into the United States under bond, altered by "manufacture * * * while in bond * * * and then withdraw[n] * * * for export * * * free of the import duty which would otherwise be payable."[18] In *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940), this Court

[17] Similar treatment is afforded under the customs laws for the supplies and stores that are retained on vessels arriving in the United States from foreign ports. 19 U.S.C. 1446.

[18] *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414, 422 (1940).

held that a state may not impose its general sales tax on articles brought into the United States pursuant to the bonded warehouse provision. The Court determined that the federal exemption from customs duties for articles admitted to a bonded warehouse under 19 U.S.C. 1311 is "tantamount to a declaration that * * * the imported merchandise shall not become a part of the common mass of taxable property within the state * * * and shall not become subject to the state taxing power." *Id.* at 429. The Court's reasoning was based on the fact that the "obvious tendency of the [federal] exemption" from duties for articles admitted to a bonded warehouse "is to encourage" the commerce that would otherwise be hindered by the imposition of the tax. *Id.* at 427; see *id.* at 428. As the Court noted, however, (*id.* at 429):

> It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty. See, *People* v. *Compagnie Generale Transatlantique*, 107 U.S. 59, 63.

Because the state tax conflicted with the accomplishment of the congressional purpose, the Court concluded that the "state tax in the circumstances must

fail as an infringement of the Congressional regulation of the commerce." 309 U.S. at 429.[19]

The rationale of *McGoldrick* applies here as well.[20] The national government admits containers employed in foreign commerce to the United States under bond for exclusive use in such commerce and subject to the requirement that they be reexported. By admitting the containers under bond, and subject to reexportation, the federal regulations implementing the Customs Convention on Containers prevent the containers from becoming part of domestic commerce. Because they are not in United States commerce, the containers may not be regarded as "a part of the common mass of taxable property within the state * * *." *McGoldrick* v. *Gulf Oil Corp.*, *supra*, 309 U.S. at 429; see *Ammex Warehouse Co.* v. *Department of Alcoholic Beverage Control*, 224 F. Supp. 546, 555

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[19] In *McGoldrick*, the Court also noted that customs regulations had expressly declared that merchandise in bonded warehouses "should be free from state taxation." *Ibid.* The Court did not rely on the regulations, however. The Court held that the regulations state "only what is implicit in the Congressional regulation" of the commerce. *Ibid.*

[20] It is not necessary for the Court to decide whether the Convention establishes the importance of uniformity and thus leads to invalidation of the state tax under the Commerce Clause or whether, instead, the Convention is a law of the United States leading to preemption of the state tax. The analysis is much the same. Compare *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429 (1978), with *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977). The dispositive feature under either analytical approach is that the federal government has established that disparate state laws offend a perceived need for nationwide uniformity.

(S.D. Cal. 1963), and thus are not subject to state taxation.

A state tax would frustrate accomplishment of the federal objective in allowing temporary free admission to containers under bond. The purpose of the Customs Convention on Containers, as implemented under 19 U.S.C. 1322, is to "develop and to facilitate the use of containers in international commerce." 20 U.S.T. at 304.[21] To achieve this purpose, containers have been afforded immunity from "not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation." Customs Convention on Containers, Article 1, 20 U.S.T. at 304. The substantial general state property tax that has

[21] The federal regulatory policy of fostering the unrestricted use of transportation equipment in international commerce extends to the treatment of other kinds of transportation equipment, including vessels and aircraft engaged in international commerce. See 19 C.F.R. 10.41a. Just as in the case of containers designated as "instruments of international traffic," vessels and aircraft engaged exclusively in international commerce normally arrive in and depart from the United States without formal entry as imported merchandise under 19 U.S.C. 1484, appraisement or assessment of duties. Vessels are subject to the special entry provisions of 19 U.S.C. 1434 and 1435, and implementing regulations, 19 C.F.R. Part 4. These provisions also apply to the arrival and departure of aircraft pursuant to Section 1109(c) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1509(c), and implementing regulations, 19 C.F.R. Part 6. The federal regulatory scheme for aircraft implements Article 24 of the Chicago Convention on International Civil Aviation, 61 Stat. 1186, which obligates the United States temporarily to admit aircraft in international commerce free of duty.

been assessed against the containers involved in this case (J.S. App. 16a) conflicts with the spirit and design of the federal scheme.[22] It lessens the effectiveness of the federal regulation by burdening foreign-owned containers with a multiple tax burden that hinders the use of such containers in our foreign commerce.

Moreover, to the extent that the tax may lead to the imposition of retaliatory taxes by our trading partners (see page 21, *supra*), the interference with the widespread use of containers in international commerce would be greatly magnified. Thus, in its "practical operation," see *First Federal Savings & Loan Association* v. *Tax Commission*, No. 77-334 (June 15, 1978), slip op. 4, the state tax interferes with the objectives of the federal regulation of this aspect of foreign commerce. The state tax "stands as an obstacle to the accomplishment and execution

[22] The uniform practice of nations has been to exempt foreign-owned containers from all taxes resulting merely from the presence of the containers in the receiving nation but to permit the assessment of "fees" related to services in fact rendered. The conduct of the parties to this treaty bears significantly in understanding its proper effect. See *Factor* v. *Laubenheimer*, 290 U.S. 276, 294-295 (1933).

The fact that Japan did not become a signatory of the Customs Convention on Containers until 1972 (Br. 33 n. 9)—the last of the three tax years here in question—is not critical to the resolution of this case. The immunities established under that Convention were enacted into positive law of the United States through promulgation of the generally applicable regulations in 19 C.F.R. 10.41a. The significance of the treaty itself is primarily in demonstrating the federal intent in adopting the federal regulatory scheme.

of the full purposes and objectives" of the federal regulation of commerce, *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941), and is thus invalid as an interference with the exclusive federal authority to regulate commerce.[23] See *Ray* v. *Atlantic Richfield Co.*,

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[23] Although, for the reasons set out in the text, we agree with appellants that California may not levy a property tax on appellants' containers, we do not agree with all of appellants' arguments. For example, as we indicate in note 13, *supra*, the Treaty of Friendship, Commerce and Navigation with Japan does not apply to taxes levied at equal rates on all property. We disagree with several of appellants' other arguments as well. Appellants argue that a federal excise tax, 46 U.S.C. 121, prevents state taxation of their containers (Br. 28). But this statute does not apply to containers admitted pursuant to the Convention under bond, and the imposition (or non-imposition) of a particular federal tax would not, in any part, preclude state taxation of the same property. See Federalist Papers No. 32-34 (*The Federalist* 240-253 (B. Wright ed. 1961)).

Appellants argue (Br. 28) that the state taxes violate "various aviation treatise and agreements" and "the GATT." They do not identify any "aviation treaty," and so it is not possible to respond to this argument. The GATT—the General Agreement on Tariffs and Trades, 61 Stat. A3—does not deal with state taxation of containers, and appellants do not point to any provision of the GATT that would be relevant to this case. At all events, the GATT is an executive agreement rather than a treaty, and we do not argue that it would of its own force nullify any state law. Cf. *Zenith Radio Corp.* v. *United States*, No. 77-539 (June 21, 1978), slip op. 13 n. 13. In some situations the GATT would have persuasive force in demonstrating a need for national uniformity or in demonstrating international custom, and thus in establishing that particular taxes are unconstitutional under the Commerce Clause, but this argument is not available here.

Appellants also maintain that the state taxes violate the Duty of Tonnage Clause (Br. 35-37) and the Due Process

Clause (Br. 48-49). The former argument fails because the tax is not based on the weight, amount, or value of the cargo that may have been in the containers; it is levied on the containers themselves. Moreover, the tax does not appear to be a subterfuge for a Duty of Tonnage. The due process argument is unpersuasive under the standards of *Lehnhausen* v. *Lake Shorte Auto Parts Co.*, 410 U.S. 356 (1973).

Appellants' argument based on the Import-Export Clause (Br. 37-43), however, is more substantial. Until recently this Court consistently held "that all [state] taxes on imports and exports and on the importing and exporting processes were banned by the Clause." *Washington Stevedoring*, *supra*, slip op. 16. The tax on containers unquestionably burdens the "importing and exporting process" and consequently, under a long line of decisions, would violate the Import-Export Clause.

Washington Stevedoring and *Michelin Tire Corp.* v. *Wages*, *supra*, however, have fundamentally altered the approach to Import-Export Clause cases. The essential inquiry now is not the burden of the tax, but whether the tax is an "Impost or Duty." Those words historically have included only taxes "directed at imports or commercial activity as such" (423 U.S. at 292), and it is difficult to contend that the California tax, levied on the general mass of property within the State, is a tax "directed at imports or commercial activity as such."

Nevertheless, we believe that the California tax offends the purposes of the Import-Export Clause, which the Court identified in *Michelin*, *supra*, 423 U.S. at 285-286. As the Court pointed out, "the Federal Government must speak with one voice when regulating commercial relations with foreign governments," and state taxes sometimes could upset foreign trade or intrude on matters exclusively within the national prerogative. For the reasons discussed in the text, we submit that the property tax at issue here could disrupt the foreign relations of the United States, and that it frustrates the ability of the national government to conduct trade with foreign nations. The state tax intrudes into an area where the United States "must speak with one voice" (*Michelin*, *supra*, 423 U.S. at 285) and thus violates the Import-Export Clause as well as the Commerce Clause. Because the arguments under the two constitutional provisions are so similar in the circum-

No. 76-930 (March 6, 1978), slip op. 5; *McGoldrick* v. *Gulf Oil Corp., supra,* 309 U.S. at 429.

CONCLUSION

The judgment of the Supreme Court of California should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
M. CARR FERGUSON,
Assistant Attorneys General.

KENT L. JONES,
Assistant to the Solicitor General.

LEONARD SCHAITMAN,
ERNEST J. BROWN,
Attorneys.

SEPTEMBER 1978.

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stances of this case, however, we have not elaborated on the Import-Export Clause argument. It is enough to note here that neither *Michelin* nor *Washington Stevedoring* undermines our submission. In both cases the Court pointed out that the tax it upheld did not affect the authority of the federal government to conduct foreign relations (423 U.S. at 286; *Washington Stevedoring, supra,* slip op. 19); in both cases there was no possibility of a multiple tax on the same property or services (*Washington Stevedoring, supra,* slip op. 19); in both cases the taxes were levied on goods or services fully admitted to the commerce of the United States and the goods were no longer in transit (423 U.S. at 289-290; *Washington Stevedoring, supra,* slip op. 23). Here, by contrast, the tax affects foreign relations, causes multiple tax burdens, and is levied on containers that are still part of foreign commerce and have never been formally entered into United States commerce.

APPENDIX A

STATE OF CALIFORNIA [SEAL]

STATE BOARD OF EQUALIZATION
1020 N Street, Sacramento, California
(P.O. Box 1799, Sacramento, California 95808)
916/445-6479

March 24, 1978

78/49

TO COUNTY ASSESSORS, COUNTY COUNSELS AND OTHER INTERESTED PARTIES:

Enclosed is a copy of a notice of public hearing to be held June 29, 1978, at 10:00 a.m. in Room 102, 1020 N Street, Sacramento, California on a proposed amendment to property tax Rule 202, Allocation of Aircraft of Certificated Air Carriers and Scheduled Air Taxi Operations.

The amendment extends the situs rule of subdivision (b) of Rule 202 to aircraft operated solely in foreign commerce. The Board's legal staff is of the opinion that two recent cases, Sea Land Service v. County of Alameda, 12 Cal. 3d 772, and Japan Line, Ltd. v. County of Los Angeles, 23 Cal. 3d 180, have overturned the former rule that aircraft operated solely in foreign commerce are protected from state property taxation by the Home-Port Doctrine. These two cases hold that the Home-Port Doctrine does not shield property with situs in California from taxation on an apportioned basis. Because our property tax rules are merely declarative of existing law, we

propose to amend Rule 202 to conform to these court decisions.

Written comments with respect to the enclosed notice are welcome and should be directed to me. If you wish to present testimony pertaining to the amendment at the hearing, please notify me by mail or telephone by June 14, 1978, so that an orderly agenda can be prepared.

Sincerely,

/s/ Janice Masterton
JANICE MASTERTON
Calendar Clerk

JM/se
Enclosure

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE STATE BOARD OF EQUALIZATION

Notice is hereby given that the State Board of Equalization, pursuant to the authority vested by Section 15606 of the Government Code, and to implement, interpret or make specific Sections 1150 through 1156 of the Revenue and Taxation Code proposes to amend Section 202(b) of Article 5, Subchapter 2, Chapter 1, Title 18, of the California Administrative Code, as follows:

1. Amend Section 202, subsection (b), Article 5, subchapter 2, chapter 1 to read:

Rule No. 202. (Cal. Adm. Code) ALLOCATION OF AIRCRAFT OF CERTIFICATED AIR CARRIERS AND SCHEDULED AIR TAXI OPERATORS

(b) SITUS. Aircraft operated by certificated air carriers (within the meaning of section 1150 of the Revenue and Taxation Code) or scheduled air taxis (within the meaning of subdivisions (a) and (b) of section 1154 of the Revenue and Taxation Code) and flown in intrastate, interstate, or foreign commerce shall be deemed to be situated only in those taxing agencies (within the meaning of section 404 of the Revenue and Taxation Code) in which the aircraft normally make physical contact. The physical contact must be intentional rather than by accident or as the result of an emergency, and it must involve

embarking or disembarking of crew, passengers, or freight.

Aircraft flying over the state without landing do not acquire situs for property tax purposes. Conversely, the situs of aircraft that depart from a taxing agency within the state, fly out of the state, and return to the same or another taxing agency within the state without landing outside the state is within the state's taxing jurisdiction throughout the flight.

Situs for property tax purposes is not affected by the legal or commercial domicile of the operator of the aircraft, *nor by the fact that the aircraft is operated solely in foreign commerce.*

Notice is also given that any person interested may present statements or arguments orally or in writing relevant to the action proposed, at Room 102, Consumer Affairs Building, 1020 N Street, Sacramento, CA 95814 at 10:00 a.m. on June 29, 1978. The State Board of Equalization upon its own motion or at the instance of any interested person, may thereafter adopt the above proposed amendment substantially as set forth without further notice.

Upon request, copies of the above regulation may be obtained from:

State Board of Equalization
1020 N Street
Sacramento, California 95814

The State Board of Equalization, has determined that, pursuant to Section 2231 of the Revenue and

Taxation Code, no increased costs or new costs to local government will result from this regulation.

Dated: March 15, 1978

STATE BOARD OF EQUALIZATION

/s/ Gordon P. Adelman
for DOUGLAS D. BELL
Executive Secretary

STATE OF CALIFORNIA

BOARD OF EQUALIZATION
PROPERTY TAX DEPARTMENT

PROPERTY TAX RULES AND REGULATIONS

Chapter 1. State Board of Equalization—Property Tax

Subchapter 2. Assessment

Article 5. Situs

References: Sections 1150-1156, Revenue and Taxation Code

Rule 202. ALLOCATION OF AIRCRAFT OF CERTIFICATED AIR CARRIERS AND SCHEDULED AIR TAXI OPERATORS

(a) AIR TAXIS. An aircraft whose owner on the lien date used it in scheduled air taxi service at any time during the representative period selected pursuant to subsection (f), or which has been purchased for scheduled air taxi service but not yet put into such service and not yet used in any other service, is assessable under sections 1150 to 1156 of the Revenue and Taxation Code and not under Part 10, Division 1, or under other situs provisions of Part 2, Division 1, of the Revenue and Taxation Code.

(b) SITUS. Aircraft operated by certificated air carriers (within the meaning of section 1150 of the Revenue and Taxation Code) or scheduled air taxis (within the meaning of subdivisions (a) and (b) of

section 1154 of the Revenue and Taxation Code) and flown in intrastate, interstate, or foreign commerce shall be deemed to be situated only in those taxing agencies (within the meaning of section 404 of the Revenue and Taxation Code) in which the aircraft normally make physical contact. The physical contact must be intentional rather than by accident or as the result of an emergency, and it must involve embarking or disembarking of crew, passengers, or freight.

Aircraft flying over the state without landing do not acquire situs for property tax purposes. Conversely, the situs of aircraft that depart from a taxing agency within the state, fly out of the state, and return to the same or another taxing agency within the state without landing outside the state is within the state's taxing jurisdiction throughout the flight.

Situs for property tax purposes is not affected by the legal or commercial domicile of the operator of the aircraft, *nor by the fact that the aircraft is operated solely in foreign commerce.*

(c) ALLOCATION FORMULA. The allocation formula to be used by each assessor is composed of two factors: (1) ground and flight time and (2) aircraft arrivals and departures.

Time allocable to an airport is the amount of time that certificated aircraft and scheduled air taxis are on the ground at the airport, plus a portion of the incoming and outgoing flight time computed pursuant

to subsection (d). The ratio of the time allocable to the airport during a representative period to the sum of the time allocable to the airport and the time allocable elsewhere is the ground and flight time factor. In computing the ground and flight time factor, the following shall be excluded:

From the time allocable to the airport—

(1) All ground and flight time prior to the aircraft's first entry into the revenue service of the air carrier in control of the aircraft on the current lien date.

(2) All ground time in excess of 12 consecutive hours at the airport following entry into revenue service.

From the total time—

(1) All ground and flight time prior to the aircraft's first entry into the revenue service of the air carrier in control of the aircraft on the current lien date.

This factor shall be multiplied by 75 percent to obtain a weighted ground and flight time factor.

The aircraft arrivals and departures factor is the ratio of the number of arrivals at and departures from an airport during a representative period to the total number of arrivals at and departures from all airports during the representative period. This factor shall be multiplied by 25 percent to obtain a weighted arrivals and departures factor.

The weighted time factor shall be added to the weighted arrivals and departures factor. The sum of the two weighted factors yields the allocation ratio to be applied to the full cash value of the aircraft to determine the full cash value allocable to the airport.

(d) ALLOCATION OF FLIGHT TIME. For aircraft flying from one California airport to another California airport, the flight time attributable to each airport is one-half the flight time between the airports.

For aircraft arriving from an airport outside the state or leaving for an airport outside the state, the flight time from or to the state boundary shall be allocated to the California airport in which the aircraft first lands or last takes off, as the case may be. The flight time to the state boundary crossing point on a great circle flight to the first landing point outside the state; (2) divide this mileage by the total great circle mileage from the airport to the first landing point outside the state; (3) multiply this percentage by the total flight time from the airport to the first landing point outside the state. The same procedure shall be used for inbound flights from outside the state. To allow for differences in take-off, landing, and cruising speeds and for varying take-off and landing patterns, the time allocated to an airport shall not be less than five minutes for an incoming or an outgoing flight. In lieu of the actual flight time for a single flight, the average flight time between two ports, or between a port and the state line, for

two or more flights of a single carrier or of more than one carrier shall be used when such an average is promulgated by the board unless the assessor has documented evidence which justifies departure from such average time.

(e) SOURCES OF ALLOCATION DATA. For scheduled operations, arrivals and departures and ground and flight time shall be derived from the carrier's operating schedules. For nonscheduled operations, including but not limited to, overhaul, pilot training, charter, military contract flights, and standby services, ground and flight time and arrivals and departures shall be derived from the carrier's recorded operations.

(f) REPRESENTATIVE PERIOD. Annually, on or before February 15, the board shall consult with the assessors of the counties in which air carriers' aircraft normally make physical contact. On or before March 1, the board shall designate a representative period to be used by all assessors in assessing the aircraft of each carrier for the forthcoming fiscal year.

(g) APPLICATION OF ALLOCATION FORMULA. The aircraft of certificated air carriers and scheduled air taxi operators shall be segregated by type, and a separate allocation ratio shall be computed for each type which has established a tax situs within the state, excluding those makes within a type which have not established a tax situs within the state. Each allocation ratio shall then be applied to

the total value of the carrier's aircraft of each type to which the allocation ratio applies, excluding those makes within a type which have not established a tax situs within the state.
The types are as follows:

(1) Piston-powered
(2) Turboprop-powered
(3) Helicopter
(4) Turbojet and Turbofan powered

(A) Two engine
(B) Three engine
(C) Four engine
(D) DC-8-60 series
(E) Boeing 747
(F) DC-10 and L 1011

History: Adopted March 9, 1967, effective March 10, 1967.

Amended January 8, 1969, effective February 12, 1969.

Amended December 12, 1969, effective January 11, 1970.

Amended February 16, 1970, effective March 26, 1970.

Amended December 20, 1971, effective January 19, 1972.

Amended February 21, 1974, effective February 26, 1974.

Amended December 17, 1975, effective January 25, 1976.

APPENDIX B

STATE OF CALIFORNIA [SEAL]

STATE BOARD OF EQUALIZATION
1020 N Street, Sacramento, California
(P.O. Box 1799, Sacramento, California 95808)
916/445-6479

June 16, 1978

78/104

TO COUNTY ASSESSORS, COUNTY COUNSELS AND OTHER INTERESTED PARTIES:

CANCELLATION OF PUBLIC HEARING— RULE 202

This is to inform you of the cancellation of public hearing of proposed amendments to Rule 202, Allocation of Aircraft of Certificated Air Carriers and Scheduled Air Taxi Operators, originally scheduled for June 29, 1978, at 10:00 a.m. A copy of the notice of cancellation is printed on the reverse.

The purpose of the proposed amendments was to conform to the California Supreme Court decision in the case of *Japan Line, Ltd.* v. *County of Los Angeles*, 20 Cal. 3d 180. This case is now before the U.S. Supreme Court.

If the hearing is rescheduled, the time and place of hearing will be announced.

Sincerely,

/s/ Janice Masterton
JANICE MASTERTON
Calendar Clerk

JM/k

NOTICE OF CANCELLATION OF PUBLIC HEARING OF THE BOARD OF EQUALIZATION

By published notice dated March 24, 1978, the State Board of Equalization gave notice of its intention to hold a public hearing to consider revision of the Property Tax Rule 202, Allocation of Aircraft of Certificated Air Carriers And Scheduled Air Taxi Operators. This hearing was originally scheduled to be held on June 29, 1978, begininng at 10:00 a.m. in Room 102 at 1020 N Street, Sacramento, California, 95814.

Notice is hereby given that the hearing on the above matter has been cancelled, and may or may not be rescheduled. In the event of rescheduling, the exact time and place of the hearing will be announced in a subsequent notice.

Dated: June 16, 1978

STATE BOARD OF EQUALIZATION

/s/ Gordon P. Adelman
for DOUGLAS D. BELL
Executive Secretary

APPENDIX C

[SEAL]

DEPARTMENT OF STATE
Washington, D.C. 20520

September 7, 1978

The Honorable Wade H. McCree, Jr.
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Solicitor General:

This is in response to your office's request in the case of *Japan Lines, Ltd.* v. *County of Los Angeles*, 20 Cal. 3d 180, *appeal docketed*, No. 77-1378 (March 28, 1978) for certain information concerning tax practices of foreign countries and for views of the Department of State concerning the case.

We have queried all U.S. embassies as to tax practices in their host countries toward foreign flag carriers and other instruments of foreign commerce. We have received responses from our posts in more than one hundred and twenty countries. According to information developed by our posts, largely from discussions with the pertinent foreign officials and private U.S. flag carriers operating in each country, no foreign government, or political subdivision such as a province, state or municipality, imposes property taxes on foreign flag vessels, airlines, or containers, with the possible exception of Afghanistan. Certain foreign jurisdictions impose use taxes, *e.g.*, road

taxes on trucks and harbor use or aircraft landing fees. Afghanistan imposes a tax on containers; we are asking our Embassy to provide further information as to whether this tax applies regardless of whether the container is imported and regardless of ownership by foreign flag carriers. It should be noted that several countries impose taxes or import duties on containers which are not re-exported within a minimum time period (30 days to a year). Some embassies have not yet responded or have indicated that the desired information was not yet available to them. We will notify you promptly should further information come to our attention.

Six foreign governments, including some of our most important trading partners, have written to the Department expressing concern about the California container tax. In addition, twelve countries have sent diplomatic notes objecting to proposed personal property taxation by the State of California of foreign flag aircraft flown to and from California in foreign commerce.

The Department believes that the home-port doctrine, originally announced by the Supreme Court in *Hays* v. *Pacific Mail Steamship Co.*, 58 U.S. (17 How.) 596 (1855), should be dispositive of the instant case. It precludes the application of *ad valorem* property taxes to an instrumentality of interstate or foreign commerce by all jurisdictions except for the home or domiciliary of the instrumentality. *Id.* at 597-99. Since appellant's cargo containers are mobile equipment used in foreign commerce by foreign flag

vessels domiciled in Japan, the home-port doctrine would prevent California from imposing a property tax on the containers.

Respondents argue that the Court has repudiated the home-port doctrine in favor of an apportionment scheme, whereby each taxing authority having sufficient contacts with the instrumentality of commerce is entitled to levy a tax reflecting the time spent by the instrumentality in its own jurisdiction. Respondents' brief at 9. Whatever the merits of respondents' argument in the context of interstate commerce,* the Court has not abandoned the home-port doctrine for foreign commerce, *see Braniff Airways, Inc.* v. *Nebraska Board of Equalization and Assessment*, 347 U.S. 590, 599-600 (1954); *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169, 173 (1949). *See also*, Harvard Int'l. Program in Taxation, *World Tax Series: Taxation in the United States* 173 (1963). Indeed, on several occasions the Court has emphasized that non-domiciliary property taxation is permissible under the Commerce Clause of the Federal Constitution *only* where it is possible to prevent multiple taxation exceeding one *ad valorem* value of the taxed

* The Court has never overruled the home-port doctrine announced in *Hays* with regard to all facets of interstate commerce. For example, the Court in *Ott* v. *Mississippi Valley Barge Line Co.*, 366 U.S. 169 (1949), while upholding apportioned taxation of river barges, expressly did not reach the question of ocean-going interstate commerce. *Id.* at 173. See "Developments in the Law-Federal Limitations on State Taxation of Interstate Business," 75 *Harv. L. Rev.* 978, 986-87 (1962).

item, *Central Railroad Co.* v. *Pennsylvania*, 370 U.S. 607, 611 (1962); *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 385 (1952); *Ott* v. *Mississippi Valley, supra*, at 174. *Cf. Department of Revenue of Washington* v. *Association of Washington Stevedoring Companies*, 46 U.S.L.W. 4363 (April 26, 1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288-89, n. 15 (1977).

For instruments of foreign commerce, the Court cannot effectively prevent multiple taxation in excess of one full *ad valorem* tax, except by upholding the home-port doctrine. While in domestic commerce the Court can supervise and correct inequities in the apportionment of interstate tax burdens, the Court has no power to ensure that there is a reasonable allocation of taxing power between states and foreign countries. Under the home-port doctrine, in contrast, the Court is able to maintain American practice in accordance with the internationally accepted rule of domiciliary taxation designed to prevent multiple burdens on foreign commerce. The danger of permitting state taxation of instruments of foreign commerce on an apportioned basis in contravention of the home-port doctrine is evident in circumstances like this case; Japan taxes containers of Japan Lines at their full value under a home-port theory, yet California is seeking to impose additional taxes for time spent in California. It is our view that the risk of pyramiding taxation of instruments of foreign commerce imposed by the taxing authorities of

separate nations can be effectively avoided only by continued adherence to the home-port doctrine in such cases.

The policy underlying *Hays* has been consistently followed in the conduct of our foreign policy. It is reflected, for example, in the 1956 Customs Convention on Containers, 20 U.S.T. 301, T.I.A.S. 6634, 338 U.N.T.S. 103, which provides for temporary admission of containers free of import duties, taxes, prohibitions and restrictions, *see* Articles 1(a) and 2-6, *see also* the 1972 Customs Convention on Containers,* Articles 1(a) and 3-11, and in the Convention on International Civil Aviation, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295, in which contracting parties undertake to establish uniform customs procedures affecting international air navigation (Article 23) and to admit aircraft and aircraft stores and equipment free of duty, fees and similar national or local duties and charges (Article 24). Our adherence to the home-port doctrine is consistent with nearly universal international practice.

There are important reasons of foreign policy for not disturbing the home-port rule in foreign commerce. While foreign countries, and their political subdivisions, do not now impose property taxes on

* Customs Convention on Containers, 1972, signed at Geneva on Dec. 5, 1972, *reprinted in* [1973] Customs Convention on Containers, 1972, and International Convention for Safe Containers, Senate Doc. Exec. X, 93rd Cong. 1st Sess. 1. Instrument of ratification signed by the President on Oct. 8, 1976. Entry into force for the United States is pending deposit of the instrument of ratification.

U.S. containers or flag carriers, we cannot discount the possibility that such taxes will be imposed in retaliation if the California tax is upheld. Such retaliation would not necessarily be limited to the same degree and kind of taxation imposed by California. The extensive U.S. flag ship, air carrier, and container operations throughout the world could become subject to tax theories of more than a hundred sovereign governments and their countless subdivisions. Retaliation, moreover, may not be restricted to taxation. The United States, for example, now owns a substantial portion of the containers used in foreign commerce. Retaliation could take the form of measures to decrease use of U.S.-owned containers.

It is most unlikely that other countries would alter their approach to taxation to conform to the apportionment theory of property taxation of California. The home-port rule has long been sanctioned by international custom, and nations are unlikely to modify their taxing power over their own containers, vessels, and aircraft because one or more localities of the United States assert a broader power than the international custom.

Conceivably, the United States could seek international agreement on an apportionment rule. However, achieving such agreement as a replacement for the home-port rule would not be practicable, even if the United States were not alone in advocating a new standard. Taxing practices with respect to home-flag carriers vary widely among countries, and rules of reasonable apportionment affecting those practices

would require far more difficult accommodations among sovereign nations than apportionment among states of the United States. A process of bilateral negotiations, either in response to requests of foreign governments as a consequence of a local property tax levy in the United States, or requested by the United States as a consequence of retaliatory foreign action, would likewise be extraordinarily complicated and difficult.

In sum, adherence by the United States to the home-port doctrine with respect to instrumentalities of foreign commerce is consistent with long-standing international practice followed by virtually all governments, and reflects our view that it is the only practical rule to assure that such instrumentalities are not excessively burdened by multiple taxation.

Sincerely,

/s/ Lee R. Marks
LEE R. MARKS
Deputy Legal Adviser

☆ U. S. GOVERNMENT PRINTING OFFICE; 1978 273542 123

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO. LTD.,

Appellants,

vs.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

Brief of Amicus Curiae State of California in Support of Appellees.

EVELLE J. YOUNGER, *Attorney General,*
ERNEST P. GOODMAN, *Assistant Attorney General,*
PHILIP C. GRIFFIN,
PATTI S. KITCHING,
Deputy Attorneys General,

3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 736-2104,

Attorneys for Amicus Curiae People of the State of California in Support of Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Appellants,

vs.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

Brief of Amicus Curiae State of California in Support of Appellees.

Statement of Interest.

The State of California is vitally concerned with the outcome of the case at bar and strongly supports Appellees' position that the ad valorem tax at issue here was properly levied. California has a strong interest in preserving the integrity of the Appellees' tax base and power to tax. With the passage of Proposition XIII, the Appellees' ability to raise revenue has been greatly curtailed. It would indeed be a devastating and unfair situation to require Appellees in the case at bar to give special tax advantages to foreign commerce while requiring Appellees to provide governmental services to foreign commerce. It is the position

of the State of California that foreign commerce must pay its fair share of local governmental services provided to it. Appellants argue that they shouldn't be required to support the general municipal functions which Appellees provide, but should only be liable for taxes which directly pay for services Appellants request, such as police and fire protection. The position taken by Appellants and their supporting Amici would threaten the power of Appellees to levy nondiscriminatory, fairly apportioned ad valorem taxes against foreign commerce in return for the direct and indirect services and benefits which Appellees provide to it. There is ample authority from this Court that interstate commerce must pay its fair share of the cost of the services it receives from a county or other governmental entity. Foreign commerce should be treated no differently or else Appellees and domestic taxpayers will be required to subsidize this foreign commerce. Appellants' position would give Appellees the impossible burden of levying a tax based only on what direct service each taxpayer received. This burden would be impossible because there are many intangible and indirect services which Appellees provide to taxpayers, which services must be borne by all taxpayers equally.

Appellants' position neglects the important fact that local government in California provides general, nonspecific services to all persons and businesses within the taxing jurisdictions, including, but not limited to a stable economic climate in which to conduct business, an orderly society, and an excellent educational system to train workers available for employment by foreign commerce.

Summary of Argument.

The California Supreme Court's decision in the case at bar correctly applies both the spirit and letter of California property tax law and the decisions of this Court.

A proper analysis of current law reveals that foreign and interstate commerce must pay their fair share of government costs where they conduct their business and that local government is not obliged to subsidize their activities.

A nondiscriminatory, fairly apportioned ad valorem tax levied on Appellants' containers does not interfere with the Federal Government's power to regulate foreign commerce because the ad valorem tax at issue here is levied against all property located in California, not just that property owned by foreign corporations.

Finally, all property located in California must pay for all of the direct and indirect benefits provided by government. A taxpayer should not be able to select only those direct benefits it believes it needs, because government provides many indirect benefits to taxpayers in its jurisdiction and the cost of these benefits must be shared equally by all.

ARGUMENT.

I

Foreign Commerce Should Bear General Tax Burdens.

Appellants have correctly pointed out this Court's interpretation of the Commerce Clause that interstate commerce may be required to "pay its own way."

As this Court said in *Western Live Stock v. Bureau of Revenue* (1938) 303 U.S. 250, 254, "[i]t was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." 303 U.S. at 254.

This Court discussed at length in *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, the Commerce Clause considerations of imposing a state tax on "the privilege of doing business" within a state to the taxpayer's activity in interstate commerce. That case found that a state tax statute does not violate the Commerce Clause "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. 279. It is the position of the State of California that the nondiscriminatory, fairly apportioned ad valorem tax assessed by Appellees meets the tests set out in *Complete Auto Transit* and does not violate the Commerce Clause with regard to foreign commerce.

The reasoning behind requiring interstate commerce to pay its own way is equally applicable to foreign commerce. This Court recently discussed this principle in the context of imported foreign goods and the Import-Export Clause. In *Michelin Tire Corp. v. Wages* (1976) 423 U.S. 276, this Court said:

> "Unlike imposts and duties which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods. The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies." 423 U.S. at 287.

In *Michelin* this Court further said:

> "There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods." 423 U.S. at 289.

It follows then that the Commerce Clause should not be interpreted to accord foreign corporations preferential treatment that permits them to escape nondiscriminatory, fairly apportioned ad valorem taxes which are imposed by the Appellees without regard to foreign or domestic ownership of the property for general and specific services rendered by Appellees. It also follows that local taxpayers should not have to subsidize services used by Appellants.

Thus, pursuant to *Michelin* and *Complete Auto Transit*, the foreign taxpayers in this case must pay their fair share of taxes in return for the direct and indirect benefits they receive from the Appellees.

II

The Tax at Issue Here Does Not Interfere With the Federal Government's Regulation of Foreign Commerce.

It is the position of the State of California that the ad valorem tax at issue here does not interfere with the Federal Government's regulation of foreign commerce just as the ad valorem tax in *Michelin* did not so interfere.

Michelin discussed at length the reasons behind the Import-Export Clause and found the three main reasons to be as follows:

> 1. The Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power.
>
> 2. Import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States.
>
> 3. Harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically. 423 U.S. at 285-286.

This court in *Michelin* found that the Federal Government's exclusive regulation of foreign commerce was the most important justification for the Import-Export Clause, but that the nondiscriminatory ad valorem tax in *Michelin* had "no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce." 423 U.S. at 286.

This court said, "[B]y definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation." 423 U.S. at 286.

Appellees have not levied this ad valorem tax on Appellant's property merely because the property is owned by a foreign corporation. This ad valorem tax is levied against *all* general property in the taxing jurisdictions, whether owned by United States citizens or corporations or citizens and corporations of foreign countries. Using the *Michelin* rationale, the tax in question does not violate the Commerce Clause and does not interfere with the Federal Government's exclusive regulation of foreign commerce because the tax does not fall on property owned by a foreign corporation merely because it is owned by that foreign corporation.

III

Taxpayers Must Pay for Indirect as Well as Direct Benefits Which They Receive From Local Government.

Appellants have argued that *Complete Auto Transit* requires that foreign commerce need only pay for those direct benefits which it requests such as police and fire protection. As stated above, *Complete Auto Transit*

concluded that a tax must be fairly related to the services provided by the State. To interpret *Complete Auto Transit* in conformity with Appellants' argument would mean that Appellants would receive all of the indirect services which local government provides but not be required to pay for these services.

As stated above, Appellees provide all taxpayers with many specific, direct services such as police and fire protection, schools, flood control, mosquito abatement, etc. Appellees also provide many general, indirect services to taxpayers such as a stable economic climate, and a pool of potential employees. Appellants have taken the position that they should pay *only* for services which they feel *directly* benefit them such as police and fire protection. They argue they shouldn't pay their fair share of other services, although the flood control district protects against floods so their goods can be delivered, the schools train a pool of employable workers, the mosquito abatement district allows all taxpayers to work in the area without the public health hazard of malaria, and the general economic climate of the area allows their business to prosper.

Appellants argue that they pay specific fees (*e.g.*, wharfage fees) for their harbor activities and thus are paying their own way. However, it should be noted that U.S. corporations would pay the same wharfage fees plus general ad valorem taxes if operating under the same circumstances as Appellants.

In the case at bar, the California Supreme Court discussed the many services provided to the taxpayers by Appellees. These services included harbor facilities, roads, bridges, water suppply, as well as fire and police protection. There are many services, however, which

are more indirect but are nevertheless provided by Appellees and for which all taxpayers, whether foreign or domestic, should pay their fair share.

It would be unreasonable and impossible for Appellees to indicate on all ad valorem tax bills that portion of the tax that was used to fund general economic stability in the taxing jurisdiction. This Court should not adopt a rule that each dollar of tax collected by a governmental entity must be solely correlated to a direct service requested by the taxpayer.

Appellants' position regarding the benefits received by a taxpayer would jeopardize the general tax base of local government. Local government in California presently relies on various taxes to support its general governmental functions. This Court has not in the past required the governmental entity to show what direct service each tax dollar buys. This Court has instead required only that: "the tax is related to a corporation's local activities and the State has provided benefits and protections for those activities for which it is justified in asking a fair and reasonable return." *Colonial Pipeline Co. v. Agerton* (1975) 421 U.S. 101, 108.

This Court explained in *Illinois Central Railroad v. Decatur* (1893) 147 U.S. 190 that:

> "[T]axes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return or special benefit to any property; but only secures to the citizen that general benefit which results from protection to

his person and property, and the promotion of those various schemes which have for their object the welfare of all."

The Court went on to cite *Cooley on Taxation* and said:

> "[I]n Cooley on Taxation (page 416, c. 20, § 1) the matter is thus discussed by the author: "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good." 147 U.S. at 198-199.

This Court in *Wisconsin v. J. C. Penney Co.* (1940) 311 U.S. 435 discussed the benefits conferred upon foreign corporations within the context of the Fourteenth Amendment, but the analysis is equally compelling in the area of the Commerce Clause. In that case, this Court said:

> "[T]he Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the

> state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society . . . . Here, . . . the incidence of the tax as well as its measure is tied to the earnings which the State of Wisconsin has made possible, insofar as government is the prerequisite for the fruits of civilization for which as Mr. Justice Holmes was fond of saying, we pay tax." 311 U.S. at 444-446.

The issue of what direct benefit a taxpayer is entitled to in return for his tax payment was discussed at length in ***The Law of Taxation by Thomas M. Cooley,*** L.L.D. Fourth Edition, 1924. There Cooley said that "a person taxed cannot object to the tax on the ground that he receives no direct benefit from the application of the proceeds of the tax or that the benefit he receives is small in comparison with the benefits received by other taxpayers." *Id.* at Section 20, pp. 83-84. He goes on to say:

> "[I]f it were practicable to do so, the taxes levied by any government ought to be apportioned among the people according to the benefit which each receives from the protection the government affords him; but this is manifestly impossible. The value of life and liberty, and of the social and family rights and privileges, cannot be measured by any pecuniary standard; and by the general consent of civilized nations, income or the sources of income are almost universally made the basis upon which the ordinary taxes are estimated. This is upon the assumption, never wholly true in point of fact, but sufficiently near the truth for the

practical operations of government, that the benefit received from the government bears some proportion to the property held, or the revenue enjoyed under its protection; and though this can never be arrived at with accuracy, through the operation of any general rule, and would not be wholly just if it could be, experience has given us no better standard, and it is applied in a great variety of forms, and with more or less approximation to justice and equality. But other considerations are always admissible; what is aimed at is, not taxes strictly just, but such taxes as will best subserve the general welfare of the political society. (Footnote omitted.) Taxes proper, or general taxes, it has been said, 'proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all'. (Footnote omitted.) That this is the correct theory is beyond doubt, but nevertheless the contention has often been presented that property receiving no direct benefit from a tax for particular purpose should not be taxed for such purpose. However, it is almost unanimously held that it is no defense to the collection of a tax for a special purpose that a person liable for the tax is not benefited by the expenditure of the proceeds

of the tax or not as much benefited as others. (Footnote omitted.) For instance, every citizen is bound to pay his proportion of a school tax although he has no children (Footnote omitted), or is not a resident (Footnote omitted), and this also applies to corporations (Footnote omitted); of a police or fire tax, although he has no buildings or personal property (Footnote omitted); or of a road tax although he never used the road. (Footnote omitted.) In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefits. (Footnote omitted.) So property within the limits of a municipality is subject to local taxation although it derives little or no benefit from the municipal government. (Footnote omitted.). . . .

"Even in case of taxes imposed on a particular district supposed to be especially benefited, the fact that it is extremely doubtful whether a particular piece of land can receive any benefit from the improvement does not invalidate the tax with respect to such land. (Footnote omitted.)

"No system of taxation has yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers in proportion to payment made, as will be returned to every other individual or class paying a given tax . . ." *Id.* at Section 89, pp. 213-216.

Cooley further discusses the public purposes which justify taxation and states that these include preserving the public order, providing for the enforcement of civil rights and the punishment of crime, compensating public officers and others who perform services for the public, protecting public property, building and

repairing public buildings, and paying the expenses of legislation and of administering the laws. *Id.* at Section 198, pp. 420-421.

Finally, Cooley says taxpayers should not expect to receive equal benefits. He says:

> "[T]he uniformity and equality required in no way depends upon the benefits received. (Footnote omitted.) In order that taxation may be equal and uniform it is not necessary that the benefits arising therefrom should be enjoyed by all the people in like degree, nor that each one of the people should participate in each particular benefit. (Footnote omitted.) Equality does not mean that the pecuniary benefit to be derived by every person who pays taxes shall be equal. (Footnote omitted.) For instance, a school tax based on the same rate and the same valuation is equal and uniform although the owner of certain property taxed may have several children attending the schools while the owner of other property may have no children." *Id.* at Section 261, pp. 564-565.

Appellants receive many more benefits from Appellees than police and fire protection. Appellants and all other taxpayers receive indirect benefits such as an orderly society, and a stable economic community, and these indirect benefits must be borne by all taxpayers within the jurisdiction.

Conclusion.

The foregoing arguments demonstrate the soundness of the decision of the California Supreme Court to reject Appellants' contentions that foreign commerce should not be liable for nondiscriminatory, fairly apportioned ad valorem taxes levied by Appellees. Consequently, the State of California respectfully requests that this Court affirm the decision of the California Supreme Court.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,

ERNEST P. GOODMAN,
Assistant Attorney General,

PHILIP C. GRIFFIN,
PATTI S. KITCHING,
Deputy Attorneys General,

By PATTI S. KITCHING,

Attorneys for Amicus Curiae People of the State of California in Support of Appellees.

Service of the within and receipt of a copy thereof is hereby admitted this .... day of October, A.D. 1978.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,
Appellants,

v.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,
Appellees.

On Appeal From The Supreme Court Of The State Of California

BRIEF FOR THE CITY OF HOUSTON AS AMICUS CURIAE

ROBERT M. COLLIE, JR.
City Attorney

JAY D. HOWELL, JR.
Senior Assistant City Attorney

CHERYL HELENA CHAPMAN
DANIEL B. DOHERTY
Assistant City Attorneys

P. O. Box 1562
Houston, Texas 77001
713/222-5151

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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INTEREST OF AMICUS CURIAE

The Amicus Curiae, City of Houston, collects over $185 million in property taxes which provide for the local services provided to business and personal property, including intrastate, interstate and foreign businesses.

The assumption made and the positions taken by the Appellants would seriously erode the power of the Amicus to collect any of its ad valorem tax revenue if accepted by this Court.

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LIST OF AUTHORITIES

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SUMMARY

The assumptions advanced and the arguments propounded by Appellants represent a failure to apprehend the meaning, import, and historical origins of both the Commerce Clause and the Due Process Clause.

The Commerce Clause, as originally adopted by the states was intended to vest in the federal government the exclusive power to regulate commerce with foreign nations, among the states, and with Indian tribes. The states retained their sovereign power to impose a non-discriminatory ad valorem tax on all property within their jurisdictions, even though they may have an effect on commerce. A tax would have been considered regulatory only when it discriminated against foreign or international commerce. This position can find its support in some of our earliest constitutional cases.

The Commerce Clause vested a single power in Congress to regulate commerce. The objects of that power differ but the nature of that power does not. The Commerce Clause does not prevent a state from imposing a non-discriminatory ad valorem tax on international commerce any more than it prevents it on interstate commerce. Again, some of our earliest cases are authority for this position.

The Due Process Clause demands that the state tax only those subjects within its jurisdiction. In the area of property taxation, the Due Process Clause is satisfied if the tax is properly apportioned.

The Due Process Clause does not compel the application of the "home port" doctrine to foreign owned instrumentalities of international commerce. The application of an apportioned tax to those instrumentalities when they are taxed in full at the foreign "home port" is neither discriminatory nor impermissibly burdensome.

The factors enumerated in *Complete Auto Transit v. Brady* are guides which aid in determining the constitutionality of state taxes. Their application is not com-

pelled nor necessary in determining the constitutionality of the ad valorem property tax before this Court.

Finally, the argument that the municipalities affirmatively establish that they provide a tangible and direct service to Appellants which corresponds to the amount of the tax, is wholly without merit. The cases cited as authority for this position concern "users fees," a species of municipal exacation entirely different from the taxes involved in this case.

I. COMMERCE CLAUSE CONSIDERATIONS

A. The Commerce Clause Was Never Intended To Impede A State's Power To Impose A Non-Discriminatory Property Tax

Congress shall have the power "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes". U.S. Const., article I, section 8, clause 3.

The wording of this particular Constitutional Clause does not compel the conclusion that the states were originally prohibited from levying a non-discriminatory tax on property lying within their borders. In fact, it was not evident that this particular Clause infringed in the least upon the taxing power of the states until the *Case of the State Freight Tax* [*Reading Railroad Company v. Pennsylvania*], 82 U.S. (15 Wall.) 232 (1872) was decided in the latter part of the 19th Century. The Court concluded therein that a non-discriminatory tax levied upon freight travelling in interstate commerce was unconstitutional. Since that time, the Court has come full circle in its examination of the Commerce Clause. In

Department of Revenue v. Assoc. of Washington Stevedore Cos., ___U.S.___, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978), the Court indicated that, rather than expressing a prohibition on the *states,* the Clause should be construed as a grant of "special power" to the Congress.

It was established early in our Constitutional history that the Commerce Clause clothed the national government with the exclusive and plenary power to regulate commerce. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23 (1824). Nevertheless, Chief Justice Marshall pointed out that although the states had relinquished the power to regulate national and foreign commerce, they had not relinquished the soverign power to tax property lying within their own jurisdictions.

This taxing power was considered essential to the very existence of state government, and it was not deemed to be dependent upon nor derivative of any federal authority. The exercise of this power ran concurrently with the operation of the federal government. *Gibbons v. Ogden, supra*; *Passenger Cases* [*Smith v. Turner*] 48 U.S. (7 How.) 283 (1848).

What is the exact relation, then, of the state taxing power to the federal commerce power? In *M'Cullough v. Maryland,* 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), the Court addressed this question in the examination of a state's power to tax a nationally chartered bank.

The Court held that a state could not "retard, impede, [or] burden" the operation of Congress in carrying out its vested powers. The Court added, however, that this

limitation upon a state's powers did not deprive the state from taxing property or other interests in banks as similar property was taxed within the state.

Where a state attempted to impose an occupation tax upon importers and wholesalers of foreign goods, the Court found an impermissible infringement upon Congress' power to regulate commerce. *Brown v. Maryland,* 25 U.S. (12 Wheat.) 419, 6 L.Ed. 678 (1827). The tax constituted a charge upon the process of introducing goods into the country, and the overall effect, the Court concluded, was a regulation of commerce. The Supreme Court did again acknowledge, however, that the states retained the power to tax all property and persons within their borders on a non-discriminatory basis.

In *Passenger Cases, supra,* the Court struck down a "head tax" exacted by a state upon the passengers and crew of foreign ships. When taxation became regulation, the Court reasoned, the state had exceeded its powers. Only Congress could regulate commerce. Nevertheless, a non-discriminatory tax on commerce-related property was empowered even though it may *affect* commerce.

From the very beginning of our Constitutional history, therefore, the courts have recognized and acknowledged the states' inherent powers to tax property lying within their borders. Those powers are exceeded, and the Commerce Clause is violated, only when taxation becomes regulation. A non-discriminatory tax upon commerce-related property does not constitute such a violation.

Where the Courts have departed from this principle, the departures were premised on the assumption that a burden upon commerce amounted to a regulation of

commerce. *Case of the State Freight Tax, supra.* Even then, however, the Court has distinguished the property tax from other kinds of taxes by characterizing it as an "indirect tax" and therefore not a burden upon commerce. In *Western Union Telegraph Company v. Taggart,* 163 U.S. 1, 16 S.Ct. 1054, 41 L.Ed. 49 (1896), the state levied an ad valorem tax upon the telegraph company's property located within the state's boundaries. The value used reflected the value of the company's entire capital stock. In upholding this tax under Commerce Clause considerations, the Court adopted the following language from *Railway Company v. Backus*:

> It is enough for the state that it finds within its borders property which is of certain value . . . It is protected by state laws, and the rule of all property taxation is the rule of value; and by that rule property engaged in interstate commerce is controlled, the same as property engaged in commerce within the state. Neither is this an attempt to do by indirection what cannot be done directly; that is to cast a burden on interstate commerce. It comes rather within that large class of state action, like certain police restraints, which, while indirectly affecting, cannot be considered as a regulation of, interstate commerce, or a direct burden upon its free exercise." 154 U.S. 446, 447, 14 S.Ct. 1114. (1894)

This long-standing principle that a non-discriminatory tax on commerce does not offend the Commerce Clause was recently affirmed in *Michelin v. Wages,* 423 U.S. 296, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), where the Court noted that Georgia's non-discriminatory property tax had no impact upon the national government's power to regulate foreign commerce.

B. The Foreign Commerce Provision Of The Commerce Clause Operates As No Greater Impediment To The State Taxing Power Than The Interstate Commerce Provision

Appellants assert that the taxability of foreign-owned containers engaged exclusively in international commerce is not finally settled by interstate commerce considerations. The difference, they maintain, is that instrumentalities of international commerce lie exclusively within the province of federal concern, and therefore they are not appropriate subjects of state taxation. Furthermore, the Appellants argue that any taxation of these containers by California municipalities, even on an apportioned basis, is precluded by the actions of Japanese authorities in taxing the containers at full value.[1]

1. The Two Provisions Are Of Identical Impact On State Taxing Powers

There is no sound basis for distinguishing between instrumentalities of foreign commerce and those of interstate commerce, as they relate to the state's taxing power. The commerce clause was adopted to overcome the principal weakness of the Articles of Confederation: the absence of power in Congress to regulate commerce and the presence of that power in the state. Hartman, *State Taxation of Interstate Commerce* (Dennis & Company, Inc. 1953).

1. Appellants also contend that the taxes do not satisfy the "test" enunciated in *Complete Auto Transit v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), that is, that the taxes be non-discriminatory, that the property have a nexus, that there be a fair relationship to the benefits provided and the tax imposed, and that the taxes be apportioned. The last three factors involve due process considerations and are addressed in Part 2 of this Brief.

There is no evidence in the early cases that the foreign commerce provision of the Commerce Clause was construed to be of greater importance or magnitude than the "among the several states" provision. An early analysis of the clause indicated that the provisions were but two aspects of the same power. Only the objects of the regulatory power differed. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

In *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 6 L.Ed. 678 (1927), the Court, speaking through Chief Justice Marshall, was obliged to treat both aspects of the commerce power similarly. Having concluded that both the Commerce Clause and the Import-Export Clause prohibited a discriminatory tax on foreign articles, the Court went on to suggest, "It may be proper to add that we suppose the principles laid down in this case apply equally to importation from a Sister state."[2]

In *Pullman's Palace Car Company v. Pennsylvania*, 141 U.S. 18, 11 S.Ct. 876, 878, 35 L.Ed. 613 (1891), the Court observed, "[i]t is equally well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction."

The Supreme Court has not squarely confronted the issue of whether instrumentalities of foreign commerce

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2. In *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869), the Court did not follow the suggestion made in the *Brown* decision. Instead, it seized the original package language and held that the original package doctrine did not apply to the taxation of goods from Sister states. Commentators indicate, however, that the Import-Export clause was meant to apply both to goods from Sister states as well as from foreign countries. Clark, "Property Taxation of Foreign Goods and Enterprises—A Study of Inconsistency", 4 Pepperdine Law Review 39 (1976).

should receive different property tax treatment than those of interstate commerce.[3] In view of the earliest expression and the now accepted principle that non-discriminatory taxes are a valid exercise of state power, your Amicus would urge the Court to consider the taxability of foreign owned instrumentalities engaged in foreign commerce as it would those instrumentalities engaged in interstate commerce.

2. Taxation By A Foreign Country Does Not Preclude State Taxation Under The Commerce Clause

Appellants argue that because the foreign owned containers are taxed at full value by the government of domicile, the Commerce Clause prohibits the California municipalities from taxing on an apportioned basis. Appellants raise discrimination and multiple burdens as the objectionable result of the California tax.

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3. In *McGoldrick v. Gulf Oil Corporation*, 309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840 (1940), foreign commerce was pitted against New York State's sales tax. The sales tax was imposed on petroleum which was manufactured from imported crude and sold as ship's stores to vessels engaged in foreign commerce. The court viewed the pertinent statutory and regulatory scheme as determinative of congressional policy to exempt imported oil from state taxing powers. The court also characterized the imposition of the tax as a regulation of foreign commerce, and as such would have to give way to congressional policy. This case has been criticized because it equates the non-discriminatory tax exercise to a regulatory exercise. It has been suggested that the tax should have been analyzed on due process grounds. See Clark, "Property Taxation of Foreign Goods and Enterprises—A Study in Inconsistency", 4 Pepperdine Law Review 39 (1977). A further criticism is that the Court misinterpreted a custom regulation which the Court used as support for finding of Congressional intent. See *American Smelting & Refining Company v. County of Contra Costa*, 77 California Reporter 570 (Ct. App., 1969) appeal dismissed 90 S.Ct. 553.

The discrimination argument is as follows: Because other countries do not tax on an apportioned basis, California discriminates against foreign owned containers by imposing an apportioned tax which departs from the prevailing practice and results in duplicative taxation. This very argument was advanced and addressed in *Moorman Manufacturing Company v. Blair*, ___U.S. ___, 98 S.Ct. 2340, ___L.Ed.___ (1978). In that case Iowa imposed a net income tax based on an apportionment formula which departed from the scheme used by the majority of states. In noting the discrimination argument, the court stated in footnote twelve of the opinion:

> Appellant also contends that the Iowa formula discriminates against interstate commerce in violation of the Commerce Clause and the Equal Protection Clause, because an Illinois corporation doing business in Iowa must pay on a greater portion of its income than a local Iowa company and an Iowa company doing business in Illinois will pay on less of its income than an Illinois corporation doing business in Iowa. The simple answer, however, is that whatever disparity may have existed is not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa and Illinois statutes and Iowa is not responsible for the latter.

The *Moorman* rationale governs this case. The California municipalities are not responsible for nor can they control the exercise of Japan's taxing power. The concern clouds the real Commerce Clause issue, which is, does the tax discriminate against foreign commerce? The fact is that it does not.

The multiple burden argument is that the Commerce Clause requires the state to withdraw its taxing power whenever a foreign sovereignty exercises its full taxing power over the same subject, since there is no ultimate tribunal to compel a uniform system of taxation. Under Appellants' reasoning, a state's power to tax property within its jurisdiction depends on the whims of other governments. Carried to its logical extent, this argument requires that all instrumentalities of foreign commerce, whether owned by national or foreign governments, should be exempt from state property taxation. This clearly has never been the intent of the Commerce Clause.

In *Sea-Land Service Inc. v. County of Alameda*, 12 Cal. 3d 772, 117 Cal. Reporter 448, 528 P.2d 56, 67 (1974), the California Supreme Court observed, ". . . [i]t is clear that any threat of multiple burdens imposed by *foreign* taxing authorities is irrelevant to the crucial commerce clause issue of whether any *state* is discriminating against interstate or foreign commerce."

The commerce clause requires that the property tax be non-discriminatory. The tax in this case falls alike on all property having a presence within the California municipalities. No claim to the contrary is made. See *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Multiple burdens[4] are

4. It is interesting to note that among the factors formulated in *Complete Auto Transit* to "test" the state's taxing power, multiple burdens is not among them. This opinion recognizes that a fairly apportioned tax should necessarily avoid multiple burdens. See *Department of Revenue v. Association of Washington Stevedoring and Co.*, ___U.S.___, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978). However, to the extent that there is some overlapping of taxes, the Court recognizes that this alone does not invalidate a state tax under the commerce clause. *Moorman Manufacturing Company v. Blair*, ___U.S.___, 98 S.Ct. 2340, ___L.Ed.2d___ (1978).

avoided because the tax is fairly apportioned to the actual presence of the containers within the state.[5] Therefore, there is no commerce clause objection to the ad valorem taxes imposed.

II. DUE PROCESS CONSIDERATIONS

A. The Due Process Clause Does Not Compel The Application Of The "Home Port" Doctrine To Foreign Owned Instrumentalities Of International Commerce

Appellants begin their argument by aserting on page 22 of their Brief, "The court more than 120 years ago formulated the home port doctrine as the most appropriate means of eliminating problems of multiple taxation and interference by state or local government with the uniform regulation of foreign relations and commerce by the federal government in the highly sensitive area of international carriage of goods or persons through vessels or other instrumentalities of commerce. *Hays v. Pacific Mail Shipping Company,* 58 U.S. (17 How.) 596 (1855)." This assertion illustrates Appellants' total misconception of the *Hays* rationale. The *Hays'* court perceived the vessels as not having acquired a situs independent of its home port, where it was taxed at full value. The doctrine of taxable situs developed as a method for determining where property should be taxed. As it existed at that time, the doctrine confined taxable situs to either the owner's domicile or the place where the property came to be permanently located, the home port. An attempt to tax by any other jurisdiction would

5. See Footnote 4, above.

have been in excess of its sovereign powers The constitutional underpinnings of the *Hays'* decision would have been the due process clause, had the Fourteenth Amendment been then adopted.[6]

It was not until the decision in *Pullman's Palace Car v. Pennsylvania,* 141 U.S. 18, 11 S.Ct. 87 (1891), that the doctrine of tax situs was expanded to include localities in which property had a continuous presence. Under the expanded situs concept, each state then had the power to tax the value of that property which was continuously used within its borders.

The *Pullman* Court in distinguishing its holding from that of *Hays* reasoned that railroad cars differed from vessels because railroad cars traversed state land while vessels traversed "National" waters. Vessels only "incidentally and temporarily" touched state ports for commercial activity which never amounted to continuous presence in the state. Logically, therefore, vessels could only have one taxable situs—their home port or their owner's domicile.

While the court in *Pullman* assumed by way of dictum that regulation of vehicles engaged in commerce by water was reposed exclusively in the federal government[7] the

6. It has been held in *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment,* 347 U.S. 590, 599 (1954) that the question of whether an instrumentality of commerce has a proper tax situs within a state is one of due process.

7. This dictum in *Pullman* was certainly not irregular, in view of the Court's presupposition. The concept that any area regulated by Congress precludes state taxation, rested on the assumption that a direct tax on commerce was in effect a regulation of commerce. *Case of the State Freight Tax,* 82 U.S. (15 Wall.) 232 (1872). Furthermore, the Court reasoned that vessels, by their nature, could not acquire an independent situs since their contacts with the state were tangential.

decision rested on due process considerations, as did the decision in *Hays*.

Unfortunately, in some later cases both the *Pullman* distinction between railroad cars and vessels and the Commerce Clause dictum became authority for precluding the taxation of all vessels.

Nevertheless, in *Ott v. Mississippi Valley Barge Line Company*, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585 (1949), the Court announced that a non-domiciliary state may impose an apportioned tax on the tugs and barges which continually used its port and facilities while engaging in interstate commerce. After honoring the maxim that interstate commerce should be made to pay its way, the Court stated, "We see no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. . . . So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits or protection conferred or afforded by the taxing state." And the Court continued, "We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises." 336 U.S. at 174, 175, 69 S.Ct. at 434, 435.

The Court did however limit its holding to the facts and stated that it would not reach the question of the taxability of ocean vessels. It is in this circumspection that Appellants find comfort. Appellants maintain that the *Ott* Court's refusal to issue dicta manifested an intent to retain the home port doctrine as applied to instrumentalities of international commerce.

At this point Appellants' logic fails entirely. Appellants argue that since the "home port" doctrine should apply to ocean vessels then it should apply equally to the containers used in international commerce. If the decision in *Hays, Pullman* and *Ott* can be read by the loosest interpretation as fixing tax situs at the "home port" of ocean vessels, then that is all that they do. As the *Pullman* Court analyzed, instrumentalities of land commerce have a substantial connection to the state through which they traverse. Ocean-going ships, however, only touch the ports of a state, which the Court considered to be a minimal contact. By no stretch of language or imagination can these cases be read to fix the situs of the *containers* at the "home port".

Undoubtedly, the decision in *Braniff* compels the extension of the apportionment doctrine for due process reasons to all instrumentalities which are habitually employed in other than the domiciliary state. *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967 (1954). The court distinguished those cases which favored the application of the "home port" doctrine to ocean vessels by noting that in those cases either the non-domiciliary states tried to impose unapportioned taxes or the domiciliary state was the only state in which the vessels had acquired situs.

B. The Taxes Meet The Requirements Of The Due Process Clause

The due process clause provides, "nor shall any state deprive any person of life, liberty or property without due process of the law." U. S. Const. amendment XIV.

The concern of your Amicus is cogently expressed by the Court itself.

> Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. "Taxable event", "jurisdiction to tax", "business situs", "extraterritoriality", are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

Wisconsin v. J. C. Penney Company, 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940).

It is now a well settled and acknowledged proposition that a state has the power to tax all property within its jurisdiction. *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

Such a power runs afoul of neither the Commerce Clause nor the Due Process Clause of the Constitution. *Gibbons v. Ogden, supra.*

Negatively stated, the Due Process Clause will not permit a state to tax that which is beyond its jurisdiction to tax. *Passenger Cases*, 48 U.S. (7 How.) 283 (1848), *Pullman's Palace Car v. Pennsylvania*, 141 U.S. 18, 11 S.Ct. 87 (1891), *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585 (1949), *Braniff v. Nebraska State Board of Equalization & Assessment*, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967 (1954).

Braniff and its predecessors foreclose any doubt that property employed in a state on a continuous basis may be taxed if fairly apportioned.

There has been no claim that the State of California sought to tax more than the value of the property actually present in the jurisdiction.[8] Appellants' sole contention in this regard is that pursuant to Federal Regulation, 19 C.F.R., Section 10.41A(a)(1), the containers could not be deemed to have entered the United States and therefore could not have been present within the State of California. Section 10.41a(a)(1) concerns merely the exemption of containers from tariff duties. The reliance on that regulation is wholly irrelevant to the due process issue.

The sole question therefore is, did the State of California, acting through its municipalities, satisfy the Due Process Clause when it imposed an apportioned property tax on the value of containers which travelled through the state on a regular and continuous basis. The answer to that question, simply stated, is "yes."

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8. Appellants also argue that the municipalities did not meet the presence test required by the California Administrative Code. This argument will not be addressed in the Amicus Curiae Brief of the City of Houston.

C. The Due Process Clause (And The Commerce Clause) Does Not Compel The Application Of The Complete Auto Transit "Test"

As if to skirt the simplicity of the question and answer, Appellants urge the Court to adopt the purported test of *Complete Auto Transit v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). In referring to the analysis made in previous cases which considered the operation of the Commerce Clause, the Court made this statement:

> These decisions[8] have considered not the formal language of the tax statute, but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. 97 S.Ct. at 1079.

The decisions referred to in footnote eight were *General Motors Corporation v. Washington,* 377 U.S. 436, *Northwestern Cement Company v. Minnesota,* 358 U.S. 450, *Memphis Gas Company v. Stone,* 335 U.S. 80, *Wisconsin v. J. C. Penney Company,* 311 U.S. 435. It is significant that in none of those cited cases was it the Court's holding that a finding of all the factors referred to was necessary to sustain the tax. There are no other cases which your Amicus could find to support the conclusion that to validate a state ad valorem tax the factors of nexus, apportionment, non-discrimination and relation of benefits to taxes, must be individually satisfied.

In the field of ad valorem taxation, resort to this kind of analysis does nothing more than complicate the un-

complicated. Where a taxing authority imposes a tax on the *value* of property located or employed within its jurisdiction, due process has necessarily been satisfied. As the Court stated in *Ott v. Mississippi*:

> So far as due process is concerned, the only question is whether the tax in practical operation has relations to opportunities, benefits or protections conferred or afforded by the taxing state. . . . These requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State. 336 U.S. 169, 174, 69 S.Ct. 432, 434, 93 L.Ed. 585.

The "tests" of nexus, relation of tax to benefits, and apportionment, as applied to the facts of this case, are but illustrations of a single principle.

It should be remembered that the sole issue in *Complete Auto Transit* was that the tax was on the privilege of engaging in an interstate activity. The Court in recognizing this single issue commented that none of the above factors were involved as issues in the case. It appears that instead of formulating an affirmative test, the Court merely enumerated some of the factors which it had previously considered in resolving the constitutionality of state taxes.

The reflections of the Supreme Court serve to illuminate the dangers of facile attachment to formulas or tests in the resolution of constitutional issues.

> Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even occasional deviations over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter

> the limited nature of the function of this Court when state taxes come before it. . . . *We must be on guard against imprisoning the taxing power of the state within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.* (Emphasis supplied)

State of Wisconsin v. J. C. Penney Company, 311 U.S. at 445, 61 S.Ct. at 250.

D. The "Users Fee" Rationale Of Appellants Is Irrelevant To This Case

Appellants advance the startling proposition that a tax on instrumentalities of commerce must in fact provide a direct and tangible benefit to the taxpayer. On page 43 of their Brief, they state: "The tax in the instant case, as a general levy used to fund all public services rendered without distinction to the recipient thereof, is not the type of tax that is permissible. The tax is used not to repay for special property usage . . . but rather, for such items as school funding, mosquito abatement and other general need without limitation. Moreover, the tax is measured by the value of the container, a criterion which is wholly void of any relationship to the use of services."

They justify their arguments by the reference in *Complete Auto Transit* to *Ingels v. Morf*, 300 U.S. 290, 57 S.Ct. 439, 81 L.Ed. 653 (1937). They totally ignore, in hopes that this Court will ignore, that the *Ingels* case does not involve ad valorem property taxes, but involves "users fees".

In *Ingels*, the state imposed a flat fee on interstate caravaning.[9] The purpose of the fee was to reimburse the state for the cost of policing caravans. The Court found Due Process and Commerce Clause violations because the fee bore no reasonable relationship to the actual cost of policing caravans.[10]

The fee in *Ingels*, as well as other public use fees, are special species of state exactions which do not pertain to the issues in this case. They represent charges to direct beneficiaries of state owned facilities to help defray the costs thereof.

In *Massachusetts v. United States*, ____U.S.____, 98 S.Ct. 1153, 1165, ____L.Ed.2d____ (1978), the constitutionality of a "users fee" was most recently considered. In that case this Court observed:

> Our decisions implementing these constitutional provisions have consistently recognized that the interests protected by these clauses are not offended by revenue measures that operate only to compensate a government for benefits supplied. See, e.g., *Clyde Mallory Lines v. Alabama, supra* (flat fee charged each vessel entering port upheld because charge operated to defray cost of harbor policing); *Evansville-Vanderburgh Airport Auth. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972) ($1 head tax on enplaning commercial air passengers upheld under the Commerce Clause because designed to recoup cost of airport facilities).

9. Caravaning was defined as the act of transporting vehicles in tow.

10. It is interesting to note that although the fee did not apply to intrastate caravaning, the Court held that the fee did not offend the Commerce Clause for that reason.

> A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost and, provided that the charge is structured to compensate the government for the benefit conferred, there can be no danger of the kind of interference with constitutionally valued activity that the clauses were designed to prohibit.

The "users fee" rationale does not provide a basis for determining the constitutionality of an ad varolem tax. The arguments advanced and the cases in support thereof are wholly inapposite to the issues in this case.

CONCLUSION

The Appellees have not offended the Due Process or Commerce Clause by imposing a non-discriminatory, apportioned ad varolem tax on the containers owned by Japanese domiciliaries which are used exclusively in international commerce.

Respectfully submitted,

ROBERT M. COLLIE, JR.
City Attorney

JAY D. HOWELL, JR.
Senior Assistant City Attorney

CHERYL HELENA CHAPMAN
DANIEL B. DOHERTY
Assistant City Attorneys

P. O. Box 1562
Houston, Texas 77001
713/222-5151

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1977
No. 77-1378

JAPAN LINE, LTD., *et al*,

Appellants,

v.

COUNTY OF LOS ANGELES, *et al*,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF CALIFORNIA

AMICUS BRIEF OF THE MULTISTATE TAX COMMISSION AND PARTICIPATING STATES

Attorney for Amici Curiae

WILLIAM D. DEXTER,
General Counsel
Multistate Tax Commission
Bank of Olympia Building
Olympia, Washington 98501
(206) 943-8320

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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WILLIAM D. DEXTER,
General Counsel
Multistate Tax Commission
Bank of Olympia Building
Olympia, Washington 98501
(206) 943-8320

PARTICIPATING AMICUS CURIAE

State of Alabama
William J. Baxley
Attorney General of Alabama
State Administrative Building
Montgomery, Alabama 36130

State of Alaska
Avrum M. Gross
Attorney General of Alaska
Department of Law
Pouch K
State Capitol
Juneau, Alaska 99811

State of Arizona
John A. Lasota, Jr.
Attorney General of Arizona
159 State Capitol Bldg.
Phoenix, Arizona

State of Arkansas
William J. Clinton
Attorney General of Arkansas
Justice Building
Little Rock, Arkansas 72201

State of Hawaii
Ronald Amemuja
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

State of Louisiana
William J. Guste, Jr.
Attorney General of Louisiana
P. O. Box 4005(4)
Baton Rouge, Louisiana 70804

State of Minnesota
Warren R. Spannaus
Attorney General of Minnesota
102 State Capitol
St. Paul, Minnesota 55155

State of Montana
Honorable Mike Greely
Attorney General
Capitol Station 1
Helena, Montana 95601
Robert W. Corcoran
Special Assistant
Attorney General
Department of Revenue
Mitchell Building
Helena, Montana 59601

State of Wisconsin
Bronson C. La Follette
Attorney General of Wisconsin
State Capitol
Madison, Wisconsin 53702

State of Nebraska
Paul L. Douglas
Attorney General of Nebraska
Room 2115, State Capitol
Lincoln, Nebraska 68509

State of New Mexico
Antonio Anaya
Attorney General of New Mexico
Battan Building
P. O. Box 1508
Santa Fe, New Mexico 87501

State of North Carolina
Rufus L. Edmistein
Attorney General of
North Carolina
Justice Building
P. O. Box 629
Raleigh, North Carolina 27602

State of North Dakota
Office of State Tax Commission
Albert A. Hausauer
Special Assistant
Attorney General
Box 485
Bismarck, North Dakota 58501

State of Oregon
Honorable James Redden
Attorney General of Oregon
Department of Justice
100 State Office Bldg.
Salem, Oregon 97310

State of Pennsylvania
Gerald Gornish
Attorney General of Pennsylvania
Capitol Annex, Room 1
Harrisburg, Pennsylvania 17120

State of Utah
Robert B. Hansen
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84132

State of Washington
Slade Gorton
Attorney General of Washington
Temple of Justice
Olympia, Washington 98504

State of New Hampshire
David H. Souter
Attorney General of
New Hampshire
State House Annex 208
Concord, New Hampshire 03301

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CONSENT OF THE PARTIES

Amici are filing this brief with the consent of both parties, whose letters of consent have been filed with the Clerk.

STATEMENT OF INTEREST

The Multistate Tax Commission consists of nineteen states as full members and 13 states as associate members working to resolve problems in state taxation of multistate — multinational businesses.[1] The Commission seeks both

[1]The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oregon, South Dakota, Texas, Utah and Washington.

The current associate members are the states of Alabama, Arizona, Georgia, Lousiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee, and West Virginia.

uniformity in state tax treatment of such businesses, and fairness and equity between such businesses and smaller in-state businesses. The Commission is working also to advance effective enforcement of state corporate tax laws, and seeks policies which are simple and comprehensible for public officials and business taxpayers alike.[2]

The present case raises matters of vital concern to the Commission and the states. The first part of these is the casual involving of alleged foreign policy concerns to prevent a fair and uniform state or local tax system. As the economics of separate nations become more entwined, virtually every item of commerce touches or is touched by the foreign interests in some way. There is a great difference between foreign economic interests and the policy goals of particular federal officials on the one hand, and foreign policy for constitutional purposes on the other. The states have a vital interest in preventing the federal involvement in foreign affairs from spilling over indiscriminately into state tax policies affecting property or activities within their borders.

The transportation industry poses especially difficult problems in this area, and the Court's discernment must be especially precise. Virtually every item and every activity in commerce today is tied to some degree to interstate and international transportation, and as transportation technology changes, the task of separating one mode from another becomes increasingly difficult. It is essential, for this reason, that the states guard against the unwarranted transfer of the peculiar legal regime, including tax exemptions, which has evolved for international shipping, to transportation equipment fundamentally different in nature and subject to an entirely separate legal and regulatory scheme.

Discernment in this area must be rooted in a precise factual record concerning the nature of both of the

[2]This Court upheld the constitutionality of the Multistate Tax Commssion in *United States Steel, et al. v. Multistate Tax Commission, et al,* ____ U.S. ____ 54 L Ed 2d 682 (1978). This Court there noted the purposes of the Compact and the Commission.

equipment in question and its movements in state, interstate, and international commerce. The states are concerned that such a record be fully developed before this Court rule on the issues posed in this case — issues which are important both in themselves and in their implications for a host of other state tax matters.

One of the most difficult and persistent issues in state business taxation is the equitable treatment of businesses based inside and outside a state. This issue has come before this Court most recently in *Moorman v. Bair,* ____ U.S. ____, 57 L.Ed.2d 197, 98 S.Ct. 2340 (1978).

The states have an immediate interest in any cause before this Court which could compel them to discriminate against firms based within their borders and in favor of firms based elsewhere. The Constitution does not require this Court to institute an inconsistent and discriminatory state tax regime affecting interstate and foreign commerce, and the convenience of foreign based businesses does not alter this fact.

Such a discriminatory regime, moreover, would introduce extreme complexity to state tax laws and their administration, especially when in practice, the equipment in question, cargo "vans" or "containers", flow interchangeably between modes of transportation and between interstate, intrastate, and foreign commerce to a degree to which the record in this case does not define. Simplicity and administrative feasibility in itself may not be a constitutional standard, but it is a goal which further impels the states to bring the enclosed matters before the Court in this cause.

Finally, the states have a vital interest in insuring that all businesses carrying on activities within their jurisdiction, and benefitting from governmental services and functions, bear their share of the public cost of these activities. This is not just a question of revenues, it is a question of tax justice as well.

STATEMENT

In light of the various assumptions and conjectures upon which the Appellants, their amici curiae, and the

Solicitor General, hereinafter referred to as "Appellants, et al", build their case, we believe that it is essential that this Court be keenly aware of the limited facts that are contained in the record and the limited inferences that can be drawn from those facts. It is also important for this Court to have in mind what are purported to be facts, which are not contained in the record, which the Appellants, et al, rely upon in support of their argument.

In disposition of this appeal, the Court should be aware of: (1) the facts concerning the utilization of the Appellant's containers in California and other parts of the United States are fragmentary and incomplete; (2) that how and to what extent containers are taxed by Japan and other foreign nations is absent from the record; and (3) while the agreed statement indicates that the cargo shipping containers in question were owned and controlled by the Appellants (App. 29), the Appellants' Complaints establish that on the assessment dates (March 1, 1970, 1971 and 1972), the Appellants were the owners and *lessees* of certain cargo containers located in the City of Los Angeles (App. 4, 10, 16).

In further regard to the containers, the agreed statement reads:

> 1. Said containers are used exclusively for the transportation of cargo for hire in foreign commerce. (App. 30).
>
> 2. Said containers are never used for intrastate or interstate transportation of cargo except as continuation of international voyages. (App. 30).
>
> 3. Interstate or intrastate movement of empty containers is solely for the purpose of picking up cargo to be carried in foreign commerce, or returning the containers to ports (principally Los Angeles), all containers thereafter moving by plaintiff's vessels to foreign countries. (App. 30).
>
> 4. All of the loaded containers physically present within Los Angeles County on the lien dates were loaded with cargo either inbound from or outbound from foreign ports. (App. 30).

> 5. All empty containers physically present within Los Angeles County on the lien dates were loaded with cargo to be carried on plaintiff's vessels in foreign commerce, or carried to other ports (principally in Japan) by plaintiff's vessels. (App. 30).
>
> 6. No container had the usual place of return in California or the United States between uses. (App. 30).
>
> 7. Each container is in constant transit save for repairs time and time awaiting new cargo. (App. 31).
>
> 8. The average stay of any container in California at any one time is less than three weeks. (App. 30).
>
> 9. No container is permanently situated in California or scheduled, on departure from Los Angeles, to return to Los Angeles or any other place in California or the United States. (App. 31).
>
> 10. In general, all containers carried by plaintiff's vessels as aforesaid, including the subject containers, upon arrival from Japan are discharged from said vessels in the port of Los Angeles and either (1) transported by truck or rail to the ultimate inland destination of the imported cargo contained therein, or (2) unloaded in Los Angeles harbor.
>
> a. Those containers transported to such inland destinations are unloaded at such destinations and are then either (1) reloaded with export cargo at an inland location and transported to one of the plaintiff's vessels by truck or rail for air export, or (2) returned empty by truck or rail to Los Angeles harbor for export or reloading for export, all containers thereafter moving by said vessels to Japan. (App. 31-32).
>
> 11. The inland (outside Los Angeles harbor) destinations and origins of cargo carried in said containers include locations in other states, as well as in California. (App. 32).
>
> 12. An outboard container may leave the United States through any port, and need not leave through the port to which it entered the United States. (App. 32).
>
> 13. The number of containers physically present in Los Angeles County on the lien dates, 1970, 1971, and

1972, is fairly representative of the number of containers present in Los Angeles County on other dates throughout the tax year. (App. 33).

14. All containers of plaintiffs are subject to property tax and are, in fact, taxed in Japan. (App. 32).

15. All of plaintiff's vessels on which the subject containers are carried, are specifically designed and constructed to accommodate the subject containers, and carry only cargo in such containers. (App. 31).

The foregoing statements contain all there is in the record concerning the containers in question and Japan's tax policy or any other tax policy concerning the same.

Based on the record in this cause, the only question presented is whether or not the commerce clause prohibits the Appellees from uniformly applying the California *ad valorem* property tax on the containers leased or owned by the Appellants, which have acquired a taxable situs in Appellees' taxing districts for the years in question.

SUMMARY OF ARGUMENT

In light of the numerous questions left unanswered by the fragmentary and incomplete record in this cause, this Court does not have sufficient facts before it to decide the state tax question here involved. Given this incomplete record, the only conclusion the Court could reach would be to follow the California Supreme Court and decide, as a matter of law, that the "home port doctrine" is no longer a constitutionally required method of determining the situs of movable, tangible personal property for the purposes of state and local *ad valorem* property taxes, irrespective of whether the use of such property is associated with foreign commerce rather than interstate commerce. In no way, should this Court accept the argument of the Appellants, et al, that the "home port doctrine" should be applied to invalidate the taxes in question, (1) without knowing more about the cargo container industry in the United States and throughout the world; (2) without knowing more about the national and international policies and matters concerning the same, including *ad valorem* property taxes

and other taxes; and (3) without knowing more about the specific uses to which the cargo containers in question are put in internal commerce in the United States, and the actual business relations concerning these uses. This Court should thus dismiss the appeal for lack of a substantial federal question on the basis of the record presented.

If this Court should take jurisdiction and pass upon the merits, it should affirm the judgment of the California Supreme Court because the Appellants have utterly failed to prove the unconstitutionality of the California property tax in question as applied to them. They have not established that the "home port doctrine" (assuming that this doctrine is an otherwise viable and legitimate constitutional requirement for state and local *ad valorem* property taxation of instrumentalities of foreign commerce), can be applied to the container industry. That Appellants have failed to prove their case follows from the failure of the record to indicate that fungible containers have any "home port" or that they are such an integral part of a ship that they do not acquire a taxable situs apart from the taxable situs of a ship.

There is nothing in the record to indicate that containers are "registered" in any country or have a "home port". Furthermore, since an unknown portion of the containers in question are leased by the Appellants, and the owners of the leased containers and their "domicile" are not known, it is not possible even to apply the home port doctrine to the taxes in question without further evidence. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, *Ott v. Mississippi Barge Lines*, 336 U.S. 169, and *Braniff Airways, Inc. v. Nebraska State Board*, 347 U.S. 590, specifically uphold the constitutionality of the tax in question to the extent that the cargo containers are domestically used and owned. There is no reason to not apply the holdings of these decisions to the containers in question. Although technically they are used in "continuation of foreign commerce," they are in fact put to domestic use.

If this Court nevertheless should accept the argument of the Appellants, et al, that containers are integral parts

of a ship and that therefore their taxation is controlled by *Hays v. Pacific Mail Steamship Co.,* 58 U.S. (17 How) 595, *Hays* should be overruled as pertaining to containers. In so doing, this Court would not confront the question of whether the home port doctrine enunciated in *Hays* should be overruled as to ships engaged solely in international commerce (as it was in *Ott v. Mississippi Barge Lines, supra,* concerning ships engaged in interstate commerce).

Argument to the contrary notwithstanding, the only question before this Court is whether the *Hays* doctrine should be extended to containers which are entirely separate from, and are used in an entirely different manner than ships plying international waters.

The double taxation and international policy arguments advanced by Appellants, et al, to extend the *Hays* home port doctrine to containers, are not supported by the record. That California subjects to *ad valorem* property taxation approximately 3/52 of the total number of containers owned or used by Appellants in California during the year, coupled with the agreed statement that Japan, in some unknown fashion, subjects Appellants' containers to taxation, does not establish "double taxation" of the containers. The Court would have to know much more about the actual nature of the Japanese taxes, and about any credits offered by Japan for taxes paid elsewhere, before it could determine that any such "double taxation" exists in practice. Nor does the above-mentioned stipulation establish that California's ad valorem property tax interferes with federal international policy. Nothing in the record or relied upon by the Appellants, et al, supports the proposition that there is any such international policy. That the containers are exempt from federal custom and import duties does not establish any congressional or other federal policy pertaining to state *ad valorem* property taxation of containers. State property taxes are not "chargeable by reason of importation", and thus do not fall within customs duty exemption.

Nor does the letter solicited from the State Department by the Solicitor General (Solicitor General's brief, Exhibit C, p. 14a) establish any United States or international policy concerning state *ad valorem* taxation of containers. In fact, the very necessity for the correspondence between the Solicitor General and the Department of State in itself demonstrates that there is no such established international policy. Moreover, even if the Appellants have clearly established a customary international practice in this regard, such a showing would not control this Court's interpretation of the constitutional realm of state taxing powers. Neither the Appellants, nor their amici curiae, nor the Solicitor General have pointed to any federal legislation, treaty, convention, or any other document that in any way purports to restrict the taxing powers of the states. They argue only by analogy and implication.

In the last analysis, then, these parties are requesting this Court to construe the commerce clause to prohibit the states from applying their tax systems in any manner which would not have any impact on foreign commerce. The premise of this proposed extension of the commerce clause is that any policy touching commerce involving residents of foreign nations is under the exclusive jurisdiction of the United States government. The unprecedented and far reaching effects of such an argument cannot be over-emphasized. It is an argument, for example, that would have invalidated automatically the Washington State legislation considered by this Court in *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978), even though Congress had not legislated in the field and even though the Washington law conflicted with no established federal regulation or policy.

The Appellants, et al, would not stop here. In addition they ask this Court to include within the commerce clause the outmoded situs concepts employed by this Court in *Hays,* to prohibit any state *ad valorem* taxation of the containers in question. In so doing, they are requesting this Court to apply the commerce clause to

interstate commerce in a manner it rejected in *Moorman Manufacturing v. Bair*, ____ U.S. ____, 57 L.Ed.2d 197, 98 S.Ct. 2340.

As this Court held in the *Moorman* case, it is up to the Congress and not this Court, to establish under the commerce clause, uniform state taxation to the extent that the national interest requires it.

ARGUMENT

A. Based on the incomplete and fragmentary nature of the record, this case should be dismissed for lack of a properly presented, substantial federal question.

This Court is being asked to decide fundamental constitutional questions on the basis of a fragmentary and incomplete record consisting of Appellants' Complaints and an Agreed Statement.

The record contains no adequate description or definition of the containers in question, nor of the ways in which they are used in maritime, inland, and air-borne commerce.[3] Such information may be significant in disposing of the constitutional issue.[4]

---

[3](1) When they move on highways, are the containers required to be registered under any circumstances for motor vehicle purposes, or are the operators moving such containers required to be licensed? If so, what effect would this Court's decision have on such registration or licensing requirements?

(2) Were the containers in question capable of being used for storage as well as for transportation? If so, were they so used?

(3) Do they ever move in inland commerce and under the control or direction of the receiver or of some third party?

(4) Is a demurrage charge levied if they are not promptly unloaded by the receiver?

(5) Are they subject to admiralty law and maritime jurisdiction when they are out of the port areas?

(6) Do Appellants have possession and control of the containers when they move out of the storage area for movement in interstate and intrastate commerce?

(7) Are the containers ever loaded or unloaded by the shippers or receiver's employees? Do such functions fall within the jurisdiction of any labor unions other than the maritime or longshoremen's unions?

(8) Is maritime insurance applicable to the containers and their contents while they are being transported on land?

In short, the record is completely devoid of essential information concerning how the container business actually operates in practice in the United States and in world commerce.

The brief of the Institute of International Container Leases, Ltd. indicates that the container business is separate and distinct from the shipping business, and is in fact related to various forms of transportation. This brief further indicates that this business exists apart from the actual ownership and operation of ships. Such distinctions are essential. If, for example, this Court should determine that the inland use of cargo containers is not distinguishable from such use of truck trailers, or of railroad cars, and that such containers are put to inland use for a greater

---

(9) Are the contents interchanged among owners, in a manner similar to the practice concerning railroad boxcars?

(10) What percentage of time are containers put to use in inland transportation and other inland commercial activities and in airborne activities, as compared to their time and use on ships?

(11) What is the total number of containers used in connection with international ship operations compared to the total container capacity of cargo container ships used extensively in such commerce?

(12) What state and federal regulatory agencies exercised jurisdiction over the movement and storage of containers, and how is that jurisdiction affected when containers are put to inland use?

(13) To what extent, if any, is the inland use of the containers controlled by admiralty law and jurisdictional concepts?

(14) What percentage of containers may be used indiscriminately in intrastate, interstate and foreign commerce in the United States because they are no longer or were never subject to custom restrictions?

[4]If, for example, the containers in question are similar to those that this Court called "sea vans" in its discussion of the facts in *Michelin Tire Corp. v. Wages*, 432 U.S. 276 (1976), that information certainly would relate to the question at hand. As there indicated: "Some 25% of the tires and tubes are manufactured in and imported from Nova Scotia, and are brought to the United States in tractor-driven, over-the-road trailers packed and sealed at the Nova Scotia factory. The remaining 75% of the imported tires and tubes are brought to the United States by sea from France and Nova Scotia in sea vans packed and sealed at the foreign factories. Sea vans are essentially over-the-road trailers from which the wheels are removed before being loaded aboard ship. Upon arrival of the ship at the United States port of entry, the vans are unloaded, the wheels replaced, and the vans are tractor-hauled to petitioner's distribution warehouse after clearing customs upon payment of a 4% import duty." (432 U.S. 280)

percentage of time than they are used aboard ships, the Court could well determine that they should be classified for tax purposes in the same manner as are over-the-road truck trailers or railroad box cars, which move in either interstate or international commerce.[5]

The following conclusions stand uncontroverted by the record in this case:

1. A substantial portion of the containers in question may be owned by persons that are incorporated under the laws of California and have their principal places of business or commercial domiciles in California, and even in the City and County of Los Angeles. (This is so because the Appellants are owners of only some and lessees of others of the containers taxed by the Appellees, and the record does not disclose either the owners of the leased containers or their domicile.)

2. There is nothing in the record to establish that the "home port doctrine" has been applied by Japan or any other country for *ad valorem* property taxation of containers.

3. There is nothing in the record to establish any "home port doctrine" or other established international policy in regard to ships, let alone regarding cargo containers.

4. There is nothing in the record to establish either the *total* amount of time a container of the Appellants is actually situated in the City and County of Los Angeles during any tax year and/or situated in the United States during any tax year, or the *proportion* of a container year that is so spent. (The record only establishes that the average stay of any containers in California *at any one time*, is less than three weeks, and that none were in California for as much as six months during the twelve months immediately preceding the tax lien dates.)

[5]For example, should the over-the-road truck trailers and the sea vans involved in *Michelin, supra,* which were used to transport tires and tubes from Nova Scotia to Georgia, be accorded the same treatment for state *ad valorem* property tax purposes, or should the latter receive preferential treatment because part of their journey took place on a ship? The reasoning this Court employed in *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18 (1891), in sustaining apportionment of railroad rolling stock is equally applicable here (see *infra* pp. 23-24).

5. The record indicates nothing about the movements and treatment of damaged containers except that they are repaired in the United States.

6. There is nothing in the record to establish the basis on which Japan subjects such containers to property taxation. It remains unknown whether the Appellants under Japanese law would be entitled to a tax credit, or whether Japan actually would impose a property tax upon that portion of containers taxed by political subdivisions of the states of the United States, or that the Japanese tax system includes an annual *ad valorem* property tax.

7. There is nothing to indicate whether the property tax of Japan is imposed on ownership or possession or both. Thus, the record does not support the conclusion that the interaction between the California's property tax system and that of Japan produce in practice any double taxation of Appellants' containers.

8. There is nothing in the record to establish that the cargo containers are an integral part of a ship. (In fact, as indicated below, containers are fungible property which can be interchanged between container ships and can be transported by motor carrier, airplane, and railroad car, as well as by ship.)

9. There is nothing in the record to indicate that the Appellee's method of subjecting the cargo containers to *ad valorem* property taxes, as opposed to other methods including the so-called "home port doctrine", in any way interferes with or adversely affects any national or international interest of the United States, and/or its shipping and maritime industry.

10. There is nothing in the record which indicates the extent to which cargo containers may be in the possession, control and use of others than the Appellants while in the United States in connection with their intrastate and interstate movements and in connection with the "stripping" or "stuffing" (i.e. unloading and loading) of

the containers.

11. There is nothing in the record to indicate that the containers in question are not subject to or have not been subject to, United States customs and import duties.

In contrast to the foregoing, the following inferences may be drawn from the record in this cause:

1. Containers are fungible tangible personal property that may end up on any ship of the Appellants, or on some other carrier, and in any port of the United States.

2. Appellants' containers are used extensively in the United States, including California and the City and County of Los Angeles in intrastate and interstate commerce. (That the use is characterized in the agreed statement as a continuation of foreign commerce does not alter this fact.)

3. The containers are not designed for any particular container ship and may enter or leave the United States from any port which can accommodate cargo container ships.

4. The containers may be in the United States for an indefinite and indeterminable amount of time.

5. There are apparently repair facilities in the United States (and presumably in the City and County of Los Angeles) for the maintenance, repair and overhaul of Appellants' cargo containers.

Based on the foregoing, the record does not substantiate the arguments of the Appellants, et al, that the cargo containers are an integral part of a ship, and that the *Hays* case (assuming it is a binding precedent in light of subsequent decisions of this Court), or the "home port doctrine" enunciated therein, is depositive of the issues in this cause. For this reason we submit that the appeal should be dismissed or the judgment of the Supreme Court of California affirmed per curiam.

B. Contrary to the argument of Appellants, et al, cargo containers are not an integral part of cargo ships.

Without revealing to the Court the multiple functions and the way cargo containers are utilized, Appellants, et al, unequivocably assert that cargo containers are an integral part of "ships" and that they should be so classified by this Court in disposition of this case.[6]

To support this conclusion, Appellants, et al, rely upon *Northeast Marine Terminal Co., Inc., et al v. Caputo,* 432 U.S. 249 (1977). In disposing of that case and the companion case of *International Terminal Operating Co., Inc. v. Blundo, et al,* this Court construed the 1972 amendments to the Longshoreman's and Harbor Workmen's Compensation Act, 33 U.S.C., 903 to include an employee "stripping" (unloading) cargo containers on a dock, and an employee loading "stripped" cargo from a dock into a consignee's truck. The Court did so for the reason that the 1972 amendments were adopted by Congress to cover such employees. As noted by the Court in regard to the first employee:

> "His job was to check and mark items of cargo as they were unloaded from a container. This task is clearly an integral part of the unloading process as altered by the advent of containerization and was intended to be reached by the Amendments."
> (432 U.S. 271.)

Inasmuch as the second employee was considered covered because the 1972 amendments were intended "to encompass the waterfront areas where the overall loading and unloading process occurs" (432 U.S. 272), it was not necessary for this Court to decide whether or not containers were a part of cargo ships. The sole question was whether or not the employees in question were engaged in "maritime employment" under the 1972

[6]As indicated in this brief at pages 17-20, there is every reason to treat the cargo containers different than ships and tax them on the basis of their inland use, comparable to truck trailers, railroad rolling stock, etc. The rationale of the Courts in upholding the apportionment of a railroad rolling stock in *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18 (1891), while upholding the home port doctrine of the *Hays* case as applied to ships, support taxation of containers by the apportionment formula used by California.

amendments to the Act.

They also rely on *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 899 (2d Cir. 1971). This case was confined to resolution of a highly technical point in the Carriage of Goods by Sea Act (COGSA). Section 4(s) of that Act limits the carrier's liability to $500.00 for each "package".

Contrary to their argument here, the carriers there argued that the containers were "packages" and not part of a ship. The Court construed a "package" to be the individual bails of leather in the container for liability purposes. The shipper-plaintiff had included in its suit, Tidewater, Inc., a subsidiary of the defendant. Tidewater operated a storage warehouse on the dock. The Court held that the plaintiff's claim against Tidewater for loss of the contents of the container was not a claim in admiralty, not a maritime claim, but rather a state claim arising under the law of New York.[7]

Thus, *Northeast Marine Terminal Co. v. Caputo, supra,* and *Leathers Best, Inc. v. S.S. Mormaclynx, supra,* have no discernible relation to the question of whether or not cargo containers are integral parts of "ships" for property tax purposes.

While the record in this cause does not describe the diverse business arrangements through which containers are used by different kinds of carriers, even a cursory examination reveals a plethora of problems in the simplicity characterization by Appellants, et al, of containers as integral parts of a ship.

Appellant's case rests in large part on the assertion that the transportation equipment in question is part of a ship, and should be deemed so for local property tax purposes. The Court is told that for this reason, taxing such equipment is equivalent to taxing the ship itself, and runs afoul of all the exemptions and protections accorded

[7]Other federal courts have held, contrary to the ruling in *Leather Best, Inc., supra,* that containers in some circumstances are indeed "packages" for purposes of the carriage of goods by Sea Act. See *Royal Typewriter v. M/V Kulmerland,* 483 F.2d 643 (1973).

the sea-going vessel.

On this point the factual record in the case is especially scant. Most of the facts presented are done so by stipulation, and these stipulations leave essential questions unanswered. The Court should scrutinize closely the nature of the equipment in question, especially because in other contexts shipping companies have argued characterizations opposite to that argued for here.

This case concerns a special box used for transportation purposes and called, interchangeably, "containers" or "vans".[8]

Such boxes are built to be carried, and in fact are carried, on trucks, trains, ships, airplanes, and usually by two or more of these on the same journey.[9]

[8]See generally, Schmeltzer and Peavy, "Prospects and Problems of the Container Revolution," 1 Journal of Maritime Law and Commerce, 203 (1970), Simon, "Containers and COGSA: A Look at the Factual and Legislative Background, and a Critique of a New Judicial Formula," 5 Journal of Maritime Law and Commerce 3, (1974); and Simon, "More on the Law of Shipping Containers," 6 Journal of Maritime Law and Commerce 4, 604 (1975).

[9]See the most recent international convention on safe containers, which defines containers as follows:

> "For the purposes of the present convention:
>
> * * *
>
> (c) The term "container" shall mean an article of transport equipment (lift-van, movable tank or other similar structure):
>
> * * *
>
> (iii) specially designed to facilitate the carriage of goods, *by one or more modes of transport,* without intermediate reloading;
>
> (iv) designed for ready handling, particularly when being transferred *from one mode of transport to another,*
>
> * * *
>
> (vi) * * * The term "container" shall *not include vehicles,* accessories, or spare parts of vehicles, or packing." (Emphasis supplied)

Customs Convention on Containers, 1972, Article 1(c), Customs Convention on Containers, 1972, and International Convention for Safe Containers, Senate Executive X, Senate Committee on Foreign Relations, 93d Congress; 1st Sess. (Comm. Print November 15, 1973). See also International Convention for Safe Containers, *ibid,* and "Cargo Container and Road Vehicle Certification for Newport Under Customs Seal," 49 CFR 420.3 (1974). All of these definitions are essentially similar and each relates containers to *any* mode of transportation without even mentioning ships.

These other modes offer or have proposed to offer their customers special joint rates for containerized transportation services a portion of which move by ships.[10] Containerized shipments usually begin and end on trucks. They are regulated by the Interstate Commerce Commission, the Civil Aeronautics Board and the Federal Maritime Commission, reflecting their intermodal nature.[11]

Some "containers" are in reality self-contained truck-trailers, ready to be hooked up to a motorized cab and drawn away. Such "containers" require permits from state motor vehicle authorities.[12] Even when containers do not have such wheels, and must be loaded on flat-bed trailers for hauling, the trucker performing this hauling normally must be licensed by either the Interstate Commerce Commission or the state public utilities commission.[13] "It is very difficult to distinguish between an ordinary trailer and a container on a chassis," a former State Department advisor has written.[14]

Containers are used for temporary storage of goods as well as for transportation.[15] At such times, they serve in place of, and reduce the need for, enclosed warehouse facilities.

Containers often are loaded by the shipper, at the shipper's place of business, and by the shipper's employees, rather than at the port. This is one of the reasons that the use of containers has sparked bitter controversies between the shipping industry and the

[10]Airlines, for example, have offered special "sea-air" service to their customers. Schemitzer and Peavy, *supra* note 8, at 206.

[11]Ibid, at 204.

[12]Interview, Mr. Carroll Sloan, Washington State Department of Transportation, October 12, 1978.

[13]Ibid.

[14]Simon, "Factual and Legislative Background," *supra* note 8, at 514.

[15]Ibid at 513.

International Longshoreman's Association.[16] Their use is optional for the shipper and carriers offer discount rates as inducements for shippers to containerize their shipments.

"Many shippers construct special purpose containers for their own commodities and tender them to ship lines in accordance with tariff rules and rates," two authors have observed. Apparently, containers are used interchangeably between shipping lines and other interests, such as boxcars are used interchangeably by different railroads.

Carriers have promoted containers to their customers as a way to reduce packing costs. In lawsuits over liability for loss and damages, where liability was limited to a ceiling amount *per package*, shippers (more accurately their insurers), have argued that containers were packages for this purpose.

In sum, containers are an innovation not only for ships, but for the entire transportation industry. They intersect with state and federal laws applying to trucks, airlines. railroads, and freight forwarders, and to the labor unions associated with these, as well as to ships. Even the brief description presented above, a description of an admittedly complex subject, indicates that any attempt to characterize simplistically the boxes in question as part of ships is an exercise in legalism. They are no more a part of ships than they are parts of the trains, trucks, and airplanes which also carry them. They are a thing unto themselves, and the resolution of this controversy must rest on some grounds other than a simplistic genetic connection between containers and ocean-going vessels which sometimes carry them. If this were not so, a need for a special convention to cover their status for customs duties and import taxes would not have been necessary.

The stipulations controlling the facts of this case leave unanswered essential questions concerning the actual nature and use of the containers at issue. These questions are spelled out elsewhere in this brief (see

[16]See for example, "Case Note: 50-Mile Container Jurisdiction Clause in Longshoreman's Contract Does Not Violate Anti-Trust Laws," 2 Journal of Maritime Law and Commerce, at 426 (1971).

footnote 3, *supra*). The stipulations do not provide an adequate grounds for this Court to decide that the containers at issue are an integral part of the Appellants' ships, let alone that all containers should be so treated.

C. No precedent of this Court invalidates the California tax in question. *Hays v. Pacific Mail Steamship Co., supra* and comparable decisions of this Court are not controlling because **1) They did not involve inland instrumentalities of commerce such as the containers; 2) they did not involve commerce with foreign nations; and 3) they were based on taxable situs concepts which have been specifically overruled by this Court as applied to instrumentalities of interstate commerce.**

This Court in *Hays v. Pacific Mail Steamship Co., supra,* held that ships engaged in commerce between the City of New York and San Francisco via Panama and between San Franciso and different ports in the then territory of Oregon, did not acquire a taxable situs for *ad valorem* property tax purposes in San Francisco. The ground for that decision was that the ships were taxable by the state and jurisdiction in which they were registered, where the legal and commercial domicile of the corporate owner was located, and where the corporate stockholders resided. While the Court referred to the power of the federal government to regulate commerce with foreign nations and between the states, it rested its decision on property tax situs (jurisdiction) principles. It thus concluded:

> "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the state; they were there but temporarily, engaged in lawful trade and commerce with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid." (58 U.S. 628-629).

This case predated the statutory and judicial concept of apportioning *ad valorem* property taxes based on the average presence of movable property within a taxing jurisdiction. Ignoring for the moment the subsequent development of apportionment, the scope of the "home port doctrine" is still questionable. How for example would the Court have applied the "home port doctrine" in *Hays* if the owner had been incorporated in Delaware, the owners of the stock had resided in New Jersey, the ships had been registered in New York, the commercial domicile of the corporation had been in Massachusetts, and the ships were engaged in coastal trade between San Francisco and Los Angeles or Portland, Oregon? Similarly, what would the Court have done if the ships were owned by a subsidiary of a California corporation? Such considerations point to the legal fictions underlying the "home port doctrine." The Court in the *Hays* case recognized that ships may not be present in the "home port" for years at a time. This port was merely the corollary of the legal fiction of the owner's commercial domicile. It was the port closest to this domicile. Thus, if the domicile of the owner is in North Dakota, then the "home port" of any of this owner's ships would be any port nearest to North Dakota. Thus, the "home port doctrine" came to be based upon the twin legal fictions of the owner's commercial domicile and any port nearest to that domicile.

Indeed, this Court has had difficulty in applying the *Hays* doctrine in cases where the elements of registration, enrollment, ownership and domicile were not centered in one state.

For example, in *Old Dominions Steamship Co. v. Virginia,* 198 U.S. 299 (1905), the Court faced a situation in which the ship in question was permanently present in, and its commerce was confined to, a single state different from that of its home port. In this case, the Court found that the home port doctrine was not controlling.

In *Morgan v. Parham*, 16 Wal. 471 (1872), the Court held that a ship registered in New York (where the owner resided) was taxable by New York, even though the ship was enrolled in Mobile, Alabama and was involved only in coastal trade between Mobile and New Orleans. The Court noted that the ship "*was engaged in lawful commerce between the states with its situs at the home port of New York, where it belonged and where its owner was liable to be taxed for its value." (16 Wall. 476-477).

Other early cases such as *Ayer & Lord Tie Co. v. Commonwealth of Kentucky*, 202 U.S. 409 (1906) and *Southern Pacifc Co. v. Kentucky*, 222 U.S. 63 (1911), without alluding to the commerce clause, refined the home port doctrine of the *Hays* case. These cases permitted the taxation of ships only by the state of the domicile of the owner, irrespective of the state of registration or enrollment, and irrespective of the presence of any "port" in the state of domicile.

In *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891), the Court made a significant break from the logic of the *Hays* case. In *Pullman*, the Court upheld an *ad valorem* property tax on the rolling stock of a railroad, levied according to an apportionment formula based on operating mileage. The reasoning this Court employed to distinguish *Hays* (ships) from *Pullman* (railroad rolling stock), is important to the case at bar. The Court there held that the legislative power of every state extends to all property within its borders. The Court then noted that the old rule (expressed in the maxim *mobilia sequuntur personam*) by which personal property was regarded as subject to the law of the owner's domicile, grew up in the middle ages, and in modern times has yielded more and more to the law of the place where the property is kept and used (i.e. the *lex situs*). The Court further noted:

> "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or *foreign commerce*, like other personal property within its jurisdiction."

* * * *

> "Between ships and vessels having their situs fixed by act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily; and cars or vehicles of any kind, having no situs so fixed, and traversing the land only, the distinction is obvious."
> 141 U.S. 23.

(Citations omitted, 141 U.S. 23, emphasis added.)

In the present case, the containers in question are apportioned to California on the basis only of their inland use within California. California's property tax is in no way measured by the use of the containers on ocean-going vessels in the sea lanes of the world. *Pullman's Palace Car Co. v. Pennsylvania, supra,* therefore should be depositive of the case at bar. Thus, to sustain the *ad valorem* property tax in question, this Court need not resort to the substantial modern precedent upholding the apportionment of property taxes upon movable, tangible personal property used in interstate and foreign commerce.[17]

For commerce clause purposes, there are no valid grounds for treating containers used by ships differently than railroads, trucks, buses, and other means of inland transportation. The "sea vans" and the "over-the-road" trailers used in international commerce in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), are essentially similar to the vans at issue here, and the commerce clause requires no separate classification of these.

Are containers distinguishable from the rolling stock of the Canadian Pacific Railway Co., held taxable by the Supreme Court of Washington in *Canadian Pacific Railway Co. v. King County*, 90 Wash. 38 (1960), on authority of *Pullman's Palace Car Co. v. Pennsylvania, supra*?[18] We think not.

[17]See, for example, such cases as *Ott v. Mississippi*, 336 U.S. 169 (1949); *Braniff Airways, Inc. v. Nebraska*, 347 U.S. 590 (1954); and *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952).

[18]In the *Canadian Pacific* case, the Court distinguished *Hays v. Pacific Mail Steamship Co., supra.* The Supreme Court of Washington

D. There is nothing in the record in this cause or in the materials relied upon by Appellants, their amici curiae, and the Solicitor General, to support their argument that the ad valorem tax in question is unconstitutional under the commerce clause.

1. *The argument that the ad valorem tax in question conflicts with the exclusive authority of the federal government to regulate foreign commerce lacks any factual foundation.*

There is absolutely nothing in the record which supports the proposition that the tax in question conflicts with any established policy anywhere. The Appellants, et al, have attempted to "prove" that there is such a policy by unsubstantiated self-serving hearsay material which is not in the record. This material consists of letters which Appellants obtained from representatives of six foreign countries (Appellants' brief, Exhibits D, E, and F, pp. 15a-17a; Jur. Stat., p. 50a); and a letter the Solicitor General obtained from the Department of State, dated September 7, 1978.[19] (Solicitor General's brief, Ex. C, pp. 14a-20a.) The letters from foreign representatives do not even suggest that there is any established international policy, with the United States or otherwise, concerning *ad valorem* taxation of cargo containers.[20] That six foreign

there also noted "In Passenger Cases, 7 How. 283, at p. 402, it was said: " 'a state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as any other property owned by its citizens.' " (90 Wash. 43).

[19]While the Appellants and their amici curiae also rely on letters from foreign officials (Appellants' Br., pp. 23a-58a) concerning proposed airline property tax regulations of the California Board of Equalization (Appellants' Br., pp. 18a-22a), it is clear that these letters have nothing to do with this cause. They have not been relied upon by the Solicitor General.

[20]These letters thus stand in sharp contrast to the Solicitor General's argument that the Convention on Containers, which deals

governments have written self-serving letters to the Department of State expressing concern about the tax in question (Solicitor General's brief, page 20), "proves" nothing regarding an established international policy in this matter.

The letter the Solicitor General obtained from the Department of State, written by a deputy legal advisor, is primarily an argument that this Court should apply *Hays* to invalidate the "application of *ad valorem* property taxes to an instrumentality of interstate or foreign commerce by all jurisdictions except for the home or domiciliary of the instrumentality." From this letter the Solicitor General concludes that all nations other than Afghanistan have adhered to the "international custom" of allowing containers as well as vessels and other foreign-owned instruments of foreign commerce, to be introduced for the exclusive purpose of conducting such commerce, free of all custom duties and general taxes, including property taxes. (Solicitor General's brief, p. 15).

The letter of September 7, 1978 is pure hearsay. It contains unsubstantiated conclusions which purportedly reflect the unverified opinion of various foreign officials and private U.S. flag carriers, i.e., parties in interest. Significantly, this letter does not indicate that the federal government, let alone the United States Congress, had established any policy concerning the subject matter. Furthermore, the letter indicates that some embassies have not yet responded because the desired information was not yet available to them. (Solicitor General's brief, App. C, p. 15a).

That the Solicitor General had to make such an inquiry, that the Department of State in turn had to contact "pertinent foreign officials and private U.S. flag carriers" to obtain the information, and that the responses (which have not been made available to this Court or the

with the subject matter of federal customs and import duties, exempts the containers from state *ad valorem* property taxes. These letters do not even suggest that this convention exempts the containers in question from state *ad valorem* property taxes.

parties) are incomplete, in themselves strongly suggest the lack of any established "international custom".

It is not clear that even the presence of any "international custom" would be germane to this case. To the extent that it would be, given the state of the record, the only remaining question is whether or not there is an established custom *of the United States*. Since there is none concerning state and local *ad valorem* property taxation of containers, the Appellants, et al, have no factual support for the argument that the California *ad valorem* tax in question conflicts with any United States policy or custom.

2. *Contrary to the argument of Appellants, their amici curiae, and the Solicitor General, the ad valorem property tax in question does not conflict with any federal statutes, regulations, treaties or conventions.*

In a further effort to bolster the contention that the tax in question infringes on the power of Congress to regulate foreign commerce, the Appellants, et al, rely on the following documents: (1) the customs convention on containers, 20 U.S.T. 301; (2) the convention between the United States of America and Japan concerning income taxes, 20 U.S.T. 967; and (3) customs regulations in 19 C.F.R. 10.41(a).

The income tax convention between the United States and Japan pertains solely to income taxes of the contracting parties (i.e., United States and Japan). It does not apply to taxes of political subdivisions of the United States. Thus, this treaty and any comparable treaties or conventions are not relevant to this case because the states are not "contracting parties" and hence are not covered unless specifically mentioned.

The Solicitor General's reliance on the Customs Convention on Containers, *supra*, is equally unfounded. Obviously, if such a convention did not exist, the containers would be subject to the import duties and import taxes of the federal government and exposed to like taxation by other signatories to the Convention. Absent the Convention, there exists no restrictions on imposition

of any taxes on the imported containers. Thus the restrictions in the document can be construed no more broadly than the document itself. In no way did the Convention seek to restrict the taxing powers of the states and their political subdivisions. The import-export clause of the federal Constitution prevents the states from imposing any import or export duty or tax.

> Furthermore, under Article II of the Convention, "each contracting party shall retain their right to withhold these facilities (i.e., deny the duty and tax exemptions contained therein) in the case of containers which are imported on purchase or otherwise taken into effective possession and control by a person resident or established in its territory; the same applies to containers imported f.om a country which does not apply to provisions of this convention." (12 U.S.T. 304). (Material in parenthesis added.)

The effect of this Article on the containers in question is not revealed in the record in this case nor is it known what containers in question have in fact been used in the United States contrary to the provisions of the Convention and thus have been removed from an exempt status under other terms of the Convention on Containers. Furthermore, there is no evidence in the record as to what portion of the containers in question were not subject to import duties which are applicable only to containers of foreign manufacture. For ought that appears in the record, thus, movement of the containers in question is controlled by 19 C.F.R. 10.41(b) rather than 19 C.F.R. 10.41(a).

In short, in order for the Solicitor General to rely on the Convention on Containers, he would have to provide supporting facts which have not come forward in this case.

Assuming a proper factual basis, still there is no provision of Section 322(a) of the Tariff Act of 1930, (19 U.S.C. 1322(a)) or the Secretary's regulations issued pursuant thereto, 19 C.F.R. 10.41(a), (b), to remove the containers in question form state and local taxation. The Solicitor General asserts:

"This statute authorizes the Secretary of State to grant the customary exemption from the application of the *customs laws* to vehicles and other instruments of international traffic."

(Solicitor General's brief, p. 24). (Emphasis added.)

Does the Solicitor General argue that California's *ad valorem* property tax is regulated by custom laws of the United States and empowers the Secretary to exempt containers from California's *ad valorem* property tax? Apparently he does.

Based on Section 322(a) of the Tariff Act of 1930 and on the Customs Convention on Containers, coupled with this Court's holding in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 441 (1940), the Solicitor General concludes, however, that the states are precluded from treating containers as entering into the commerce of the United States, and thus into their jurisdiction. The broad implications of such argument should be noted.

Containers travel the nation's highways, airways, and railroads. They are utilized by various businesses in loading and unloading cargo for import and export. If the United States government itself and the states are required to treat these containers as though they were not physically present in the United States, the regulatory agencies of the state, local and federal governments, and law enforcement officers generally, could not act to protect the general welfare of residents and citizens of the United States. Neither the Convention on Containers nor Section 1322 of the Tariff Act of 1930 authorize or contemplate any such sweeping results.

After concluding that the containers in question are subject to the bonding provisions of 19 C.F.R. 10.41(a) — which is not supported by the record — the Solicitor General concludes that these containers have not entered into the commerce of the United States on authority of *McGoldrick v. Gulf Oil Corp., supra.* The *McGoldrick* case concerned a general sales tax on the sale of oil exported from an "in bond" refining facility for consumption aboard a ship in foreign commerce. There

existed express federal legislation which was specifically enacted to protect imported oil and its refined products from taxation in order to help U.S. refiners compete with foreign refiners in selling fuel oil to ships in foreign commerce. Congress has enacted no such comprehensive scheme of exemption for ship containers. In fact, it has enacted no legislation of any kind whatsoever concerning this subject matter.

In fact, the result argued for by Appellants, et al, is the very opposite of that reached in *McGoldrick*. The congressional legislation on which that case turned was enacted to help U.S. refiners match their foreign competitors. The Court feared, justifiably or not, that the sales tax in question would counteract to some unknown degree that congressional purpose. Here, Appellants argue for a result which would *favor* foreign owners of containers over those based in California and elsewhere. The Court should not assume such a federal policy absent specific statutory reference.

Finally, it should be noted that the *McGoldrick* case involved an *item* in commerce, i.e., oil. It did not concern a vehicle in which commerce is conducted. Vehicles invoke a whole realm of regulatory provisions and judicial precedents which are not present in cases concerning items of commerce alone.

The Solicitor general argues that the Customs Convention on Containers "is to preclude these articles from entering into the commerce of the United States." (Solicitor General's brief, p. 25). As we read the Convention, it was intended to do just the opposite, that is to permit the containers to enter into the commerce of the United States free from payment of import duties and taxes. The fact that the containers entered into commerce of the United States and other signatories countries triggered the need for this Convention.

In further reference to the Solicitor General's argument based on 19 C.F.R. 10.41(a), it is important to note that domestic manufactured containers, which are not subject to any import customs or duties are treated

comparable under 19 C.F.R. 10.41(b) to containers under 19 C.F.R. 10.41(a). Furthermore, 19 C.F.R. 10.41(a) does not distinguish between domestically or foreign owned containers. Both classes of containers are subject to bond to insure compliance with the Customs regulations. Furthermore, nothing in 19 C.F.R. 10.41(a) limits the application of these regulations to either foreign owned or foreign manufactured containers or containers used aboard ship. Thus, the Solicitor General's argument that containers which are subject to bonding requirements do not enter the commerce of the United States for property tax purposes, would exempt all containers from *ad valorem* property tax, including domestic owned containers involved in foreign commerce and foreign owned containers on which United States custom duties and import taxes have been paid.

Furthermore, the argument of the Solicitor General ignores the fact that the *original* Convention on Containers was replaced by the 1972 Convention (footnote 9, page 17, *supra*). Article 6 of the 1972 Convention removes any bonding requirements provided for in 19 C.F.R. § 10.41 (a) & (b) since it eliminates the furnishing of any form of security.

In *Sea-Land Service, Inc. v. County of Alameda,* 117 Cal. Rptr. 448, 528 P.2d 56 (1974), *Sea-Land* relied on the "home port" doctrine and 19 C.F.R. 10.41(a) in support of its claim of federal preemption of state taxation of containers.

The California Supreme Court disposition of this argument, is equally applicable here. The California Supreme Court there noted:

> "Next Sea-Land refers to evidence of federal regulation of container traffic in international commerce to support a contention that the field is preempted by such involvement. It cites provisions of 19 Code of Federal Regulations section 10.41(a), * * * . These regulations merely exempt the containers from the levy of a customs duty every time the containers arrive in a port. They are inapplicable to a determination of whether the containers are taxable only at the owner's home port * * * . * * * Nor do the treaties and agreements between the United States and foreign nations relating to the movement of containers in international commerce have any bearing on the issue before us." (117 Cal. Rptr. 458-459.)

We thus submit that the argument of the Solicitor General built on the trilogy of the original Custom Conventions on Containers, custom regulations pursuant to Section 322(a) of the Tariff Act of 1930 (19 C.F.R. 10.41(a)), and this Court's decision in *McGoldrick v. Gulf Oil Corp., supra,* does not establish that Congress has pre-empted the field of state and local *ad valorem* taxation of containers. Neither does this trilogy establish that the *ad valorem* property tax in question interferes with any treaty or supremacy powers of the federal government.[21]

E. The Argument of the Appellants, et al, that the tax in question is invalid under the commerce clause is based on erroneous factual conclusions and a faulty analysis and application of governing constitutional principles.

In order to justify the request that this Court reverse the judgment of the California Supreme Court, and extend the legal fiction of "domicile" of *Hays* to the containers in question, the Appellants, et al, engage in a game of factual and legal semantics which strike at the foundation of our federal system. The purpose of this section of our brief is to examine the basic fallacies on which the Appellants, et al, rest their case.

1. The first fallacy is that the commerce clause of the federal Constitution invalidates any state tax which might

[21]In fact, since the only statutory authority granted by Congress to the United States to enter into the customs convention on containers, is 19 U.S.C., Section 1322(a), and since it provides that "vehicles and other instruments of international traffic, *shall be granted the customary exceptions from the application of the customs laws", there is a serious question of whether Congress ever intended to exempt cargo containers.

include in its base, objects or activities also subjected to some degree of tax in a foreign country. Thus, they argue that since Japan taxes the containers in question to some unknown degree, California has no power to do so, irrespective of the actual nature of the Japanese tax and the burden it actually imposes, and irrespective of whether it conflicts with United States constitutional taxing principles.[22]

Presumably, under this argument, if the "home port" (flag) of the foreign ships are in tax haven countries such as Nigeria, Honduras or Panama, the California tax would be valid. We know of no decision of this Court or any constitutional or international law principle which invalidates any taxes of any nation or their political subdivisions solely on the basis of the taxing systems of other nations. Nevertheless, in support of their argument, Appellants, et al, argue by analogy. They contend first that the commerce clause by itself prevents interstate "double taxation" between states of the United States. Then, they go on to argue that the commerce clause prevents such "double taxation" also at the international level.

This Court has never held that the commerce clause protects interstate businesses from multiple tax burdens. This is attested to by this Court's recent decision in *Moorman Manufacturing Co. v. Bair*, ____ U.S. ____, 57 L.Ed. 2d 197, 98 S.Ct. 2340 (1978).

Moorman upheld, as constitutional under the commerce clause, the Iowa single-sales-factor income tax apportionment formula. The taxpayer (Moorman) there contended that, since its sales into Iowa were of products manufactured in Illinois, and since Illinois apportioned income on the basis of a three-factor (property, payroll and sales) formula, it was exposed to a multiple tax burden on the income from these sales.

While this Court recognized that a uniform code

[22]Our limited examination of the tax system of Japan reveals no general annual *ad valorem* property tax as such in Japan, (Guide to Japanese Taxes 1975-1976 by Taizo Hayashi, published by Ziakei Shō Hō Sha, Tokyo).

would promote the underlying objectives of the commerce clause, it refused to hold that the almost universally used three-factor apportionment formula, used by Illinois, constituted the presumptively valid constitutional standard for the apportionment of income among the states.[23]

In *Moorman*, the Court noted that tax duplication was inevitable in our federal system in the absence of uniformity prescribed by the "legislative power granted to Congress by the commerce clause of the United States Constitution" (Slip Op. 12). It specifically held that "the Constitution is neutral with respect to the contents of any uniform rule" (Slip Op. 12). It refused to determine the validity of the Iowa single factor formula by comparison of the Iowa formula with the generally accepted three factor formula used by Illinois. Thus, the fact that California's *ad valorem* property tax allegedly produces some multiple taxation at the international level due to the interaction of the tax system of California and that of Japan, does not invalidate the California tax under the commerce clause.[24]

[23]The constitutional requirements for a valid state tax on any multistate-multinational business was set forth by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), in which it rejected and overruled the legal formalism dictated by its prior decision in *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951). Commenting on its previous commerce clause decisions in this area, this Court noted:

> "These decisions have considered not the formal language of the tax statute, but rather its practical effects, and have sustained a tax against commerce clause challenge, when the tax is applied to an activity with a substantial nexus within the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state."

This Court used the term "discriminate" in the above quote in the context of a single state's tax system, and not in the context of the tax systems of the fifty states. A single state's tax does not result in unconstitutional "discrimination" because it results in some tax duplication when compared with the tax of other states.

[24]The Solicitor General cites *Moorman* on pp. 21-22 of his brief, and on p. 22 he quotes language of the case out of context. The full context is as follows:

> "While the freedom of the States to formulate independent policy in this area may have to yield to an overriding national interest in

Furthermore, any allegation of "double taxation" is clearly theoretical without specific information about the tax statutes and their effect on any particular taxpayer. For example, if Japan were to offer credit for taxes paid in the United States, that would negate the possibility of any "double taxation".

2. The second fallacy in the commerce clause argument of the Appellants, et al, is that if the California tax in question is inconsistent with the exclusive authority of the *federal government* to regulate foreign commerce, it is invalid. (Solicitor General's brief, p. 24, emphasis added.) As we understand this argument, if the *federal government* decides to adopt a certain policy, such as the exemption of containers from customs and import duties, this action of the federal government impliedly invalidates any state tax law which the *federal government* (not the Congress) determines "conflicts with the spirit and design of the federal scheme" (Solicitor General's brief, p. 39).

This argument presupposes that the sovereign taxing powers of the states are impliedly restricted by any action of the federal government, deemed by that government (we are not informed who does the deeming), as inconsistent with the federal government's exclusive "power" to regulate foreign commerce.

This new constitutional standard is implemented as did the Solicitor General in the instant case. You contact the State Department and ask for a survey of the tax practices of other nations throughout the world concerning container taxation, and solicit the State Department's views concerning how this Court should rule on the container question. If a legal advisor of the State Department concludes, after contacting various unknown

uniformity, the content of any uniform rules to which they must subscribe should be determined only after due consideration is given to the interests of all affected States. It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions." (Slip Op. p. 12).

officials and U.S. shipping interests, that most do not subject the containers of foreign domiciliary owners to *ad valorem* property taxes, and also concludes that the states of the United States should likewise exempt the containers from property taxes, you have laid the legal and factual foundation to invalidate a state *ad valorem* property tax on containers as being "inconsistent with the exclusive authority of the federal government to regulate foreign commerce" because it is contrary to the purported practice of other nations. If in your search you can uncover a Customs Convention which exempts containers which are used in connection with international commerce from customs duties and import taxes, you have additional support for your argument. If possible, you should also equip yourself with letters from foreign embassies that they view the state taxing policy with some apprehension. Based on these self-serving letters, you can further support your argument that a state *ad valorem* tax on containers is inconsistent with the federal government's exclusive power to regulate foreign commerce because such letters imply the possibility of retaliatory measures that will destroy the international practice and custom you found existed by your initial communication with the State Department. You are now well-armed to argue that any state or local tax on containers is invalid under the commerce clause.

This approach to commerce clause issues ignores the fact that the Congress is given the power under the Constitution to regulate both interstate and foreign commerce. The Appellants, et al, substitution of "the federal government" for "the Congress" is of fundamental significance in this case. Nowhere in their argument have they shown that the California property tax in question collides with any act of the Congress.

3. A third fallacy in their argument is the assumption that the states have no power at all concerning international commerce. The Appellants are undoubtedly subjected to many state and local regulations which are all valid and appropriate if they do not conflict with express

congressional enactments. This Court in *Bob-Lo Excursion Co. v. Michigan,* 333 U.S. 28, upheld a state regulation prohibiting racial discrimination on a ship plying international waters. In so doing, it stated:

> "It is far too late to maintain that the states possess no regulatory power over such (foreign) commerce. From the first meeting of the Congress, they have regulated important phases of both foreign and interstate commerce, particularly in relation to tranportation by water, with Congress' express consent. And without such consent for nearly one hundred years they have exercised like power under the local diversity branch of the formula announced in *Cooley v. Board of Wardens,* 12 How. 299. (Authorities omitted.) Indeed the *Cooley* criterion has been applied so frequently in cases concerning only commerce among the several states, it is often forgotten that that historic decision dealt indiscriminately with such commerce and foreign commerce." (333 U.S. 37-38; material in parenthesis added, footnotes omitted.)

In the recent case of *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978), this Court upheld the power of the State of Washington to regulate oil tanker traffic in Puget Sound to the extent such regulation was not specifically in conflict with preemptive federal legislation.

4. A fourth fallacy in the argument of the Appellants, et al, is that the commerce clause must be interpreted differently in regard to foreign commerce than in regard to interstate commerce. No decision of this Court so holds. There is no reason why the commerce clause, of its own force and effect, should require the State of California to apportion its property taxes on instrumentalities of interstate commerce,[25] and be prevented from doing so on instrumentalities of foreign commerce. If an even-handed and consistent interpretation of the commerce clause by this Court works adversely to the national interest in foreign commerce or in relations with foreign nations, as

[25] *Ott v. Mississippi Barge Lines,* 336 U.S. 169 (1948); *Braniff Airways, Inc. v. Nebraska State Board,* 347 U.S. 590 (1954); and *Standard Oil Co. v. Peck,* 342 U.S. 382 (1952).

claimed by the Appellants, et al, Congress has full authority to address the problems and prescribe solutions which it believes to be in the national interest. In doing so, it could consider in depth all aspects of the problem, including the legitimate concerns of all modes of commerce (whether interstate or international) and the interests of the federal government, the states and their political subdivisions, and foreign nations.

Notwithstanding the foregoing, by reliance on *Standard Oil Co. v. Peck,* 342 U.S. 382 (1952), the Appellants, et al, argue that the commerce clause as interpreted and applied by this Court eliminates multiple taxation on property on the national level. They thus conclude that the inability of this Court to do so on the international level requires a different interpretation of the commerce clause as applied to foreign commerce. This argument is not valid for the reasons heretofore stated in this brief.

Furthermore, in conformity with the apportionment requirements of *Standard Oil Co. v. Peck, supra,* and other *ad valorem* property tax decisions of this Court, different states can and do employ different valuation standards and criteria, different valuation ratios, different apportionment formulas, and assess properties within their jurisdiction at different rates. Obviously, such differences, none of which are invalid under the commerce clause, do not produce a uniform system of property taxation among the fifty states on instrumentalities of interstate commerce.

Furthermore, based on the record in this cause, there is no way of ascertaining the combined burden of the California and Japanese property tax on the Appellants' containers in question. It is not known whether such burden is greater than or less than the *ad valorem* property taxes which are imposed by the political subdivisions of the United States in accordance with apportionment rules or the *lex situs* rule.

In fact, such a tax comparison even between two states has never been undertaken by this Court to resolve

any state tax questions under the commerce clause or any other provisions of the United States Constitution.

There are also two other dimensions to the discrimination issue raised by the Appellants, et al, which should be considered by this Court.

First, if the states and their political subdivisions are required by the commerce clause to apportion *ad valorem* property taxes on movable tangible personal property on interstate instrumentalities, and are also required to impose the same tax on the same property of foreign instrumentalities on the basis of some other conflicting rule ("legal domicile" of the owner or "home port" for examples), they are constitutionally required to discriminate against either interstate instrumentalities or foreign instrumentalities of commerce. Any such discriminatory *ad valorem* property tax system, clearly violates the *ad valorem* property tax uniformity requirements contained in state constitutions, raises equal protection questions, and would impose impossible administrative burdens on local assessors. Application of the "home port" doctrine is tantamount to total exemption of containers from state *ad valorem* property taxes.[26]

[26]For example, if a local assessor must apply one standard to "domestic" containers (apportionment) and another standard to "foreign" containers (the "home port" rule), he is not permitted to assess all containers on the basis of physical presence (actual situs) in his taxing district. He must sort out the containers which are "owned" by persons domiciled in the United States from those that are owned by persons domiciled elsewhere. He cannot assess a tax on the possessory interests of the users of the containers in his district. He must then determine which containers are used in "foreign" and which are used in "domestic" commerce. He is also required to determine whether or not there are containers which are not physically present in his jurisdiction that he should tax. To determine this, he must ascertain the existence of unknown containers throughout the world. When he finds such containers, he must then determine whether they are owned by a person with a "home port" in his taxing jurisdiction. (Since legal domicile for corporations is on a state by state basis, he has no basis for concluding that any container owned by a corporation is taxable in his district.) Then he must determine whether they are used by that person in "domestic" or "foreign" commerce. If he is a local assessor in Montana (which could be the "home port" of containers used in foreign commerce), he probably won't even be aware of his "containers—tax" responsibilities.

Furthermore, any such dual interpretation of the commerce clause completely ignores the fact that many instrumentalities of commerce engage in interstate and international commerce. This alone would suggest a compelling need to apply the commerce clause in a uniform manner to both interstate and foreign commerce. As a matter of actual use, the containers in question are so used.

Secondly, Appellants, their amici curiae, and the Solicitor General would require this Court to impose a constitutionally prescribed standard for the taxation of movable tangible property of instrumentalities of foreign commerce not used in inland commerce of the United States. They do not reveal exactly what that standard would be, except to assert that this Court should affirm *Hays v. Pacific Mail Steamship Co., supra*, and the "home port" doctrine.[27]

As indicated at pages 20-23 of this brief, this Court had difficulty in applying the *Hays* case to factual patterns different than that involved in *Hays*. As there indicated, subsequent decisions of this Court apparently settled on the "home port" nearest the domicile of the owner, as a taxable situs for ships as required for federal registration purposes. None of these cases involve commerce with foreign nations, although in *Hays*, the ships operated in coastal trade including Portland which necessitated the use of inland waterways. Given the types of issues that are raised by modern shipping practices, including the container business as an adjunct to various modes of transportation and the current international problems facing the American maritime industry, as well as that of traditional maritime nations, in our judgment, this Court's affirmance of *Hays* coupled with the

[27] *Hays*, as heretofore indicated, was premised on the following facts: The legal and commercial domicile of the owner of the ships, a corporation, and its stockholders were all in New York. Also, the ships were registered in New York as the "home port" and New York was the "home port" of the ships in a physical sense. Furthermore, the ships there involved were engaged in commerce between New York, San Francisco, and Portland, Oregon.

extension of *Hays* to the ship container industry, will not provide a workable or even an ascertainable standard for taxation of containers used by various nations let alone the political subdivisions of the United States.[28]

Appellants do not assert and the record does not disclose what standard was in fact employed to subject the containers in question to taxation by Japan.[29]

What constitutes a "home port" under the laws of other nations is not revealed in any argument in this cause. Apparently, what the Appellants, et al, are asking this Court to do is to exempt containers which are used by foreign flag vessels from state and local *ad valorem* property taxes because allegedly containers which are used by American flag vessels abroad are not taxed by other nations. Also, apparently they are requesting this Court to require containers used in connection with American flag vessels (as well as the vessels themselves and other instrumentalities of the shipping industry which are not permanently located in any one state) to be taxed at the "home port" of the ship unless the ship operates in inland waters. Under the *Hays* "home port" doctrine as modified by *Ott v. Mississippi, supra*, this is the result. As stated by the Solicitor General at p. 10 of his brief:

> "We believe that *Hays* continues to state a sound principle which rests on the uniform practice of nations and protects the federal interests in the regulation of sea-borne commerce, particularly in commerce with foreign nations, and in speaking with one voice in matters affecting our foreign relations."

Since containers do not have a "home port" and are not used in connection with any particular ship, and Appellants do not own all the containers in question, the Appellants, et al, are requesting this Court to hold that all containers used in connection with foreign flag ships are exempt from all state property taxes. The question at issue then, is whether or not this Court is going to interpret the commerce clause of the United States Constitution as requiring this result. In spite of the many unanswered questions in application of the *Hays* doctrine since containers move in international and internal commerce apart from ships, this Court is asked to set a constitutional rule of taxation for containers and the container industry. Since in *Moorman* it refused to do so in regard to interstate taxation, because it concluded that this was a subject matter of congressional concern, there is no constitutional basis for it doing so in the instant case.

5. The fifth fallacy of the argument of Appellants, et al, is the proposition that apportioned *ad valorem* property taxes on tangible movable property cannot be properly apportioned on instrumentalities of international commerce. They have advanced no reason whatsoever that would support this argument except that decisions of this Court are not binding on foreign nations. This argument completely overlooks the fact that uniform and fair apportionment of taxes imposed by all nations on ships

[28]For example, would this Court's affirmance of *Hays* as contended for by the Appellants, et al, require all the conditions in *Hays* to be present to trigger *ad valorem* tax jurisdiction? If not, does the country where the ship is "registered" control? Does the technical legal domicile of the owner control rather than the commercial domicile? If the ships are physically present in the United States engaged in coastal trade, for example, oil tankers transporting oil from the Alaska oil fields to other West Coast ports, are such shipping operations controlled by *Ott v. Mississippi, supra*; or by *Hays*? If these ships are to be subject to tax anywhere (which probably is not the case because of the use of "flags of convenience" which are a modern outgrowth of the "home port doctrine"), logic dictates they should be taxable on an apportionment basis by the states in which the ships are used and state resources and benefits are made available to them.

If by the *Hays* doctrine the "domicile" of the owner controls, if the ships are in fact owned by United States residents in economic substance (parents or stockholders for example of a Panamanian "registered" tankers of subsidiary corporations), should the substance of ownership control over the form?

[29]The best that the Appellants could assert, based on paragraph 25 of the Agreed Statement, is that Japan applies the equivalent of home port doctrine. (Appellants' brief, p. 9.) In the Solicitor General's source for the so-called international custom of taxation of ships and containers (State Department letter, Solicitor General's brief p. 14a), there is no statement of the standard which is utilized by other nations to exempt foreign flag vessels or containers. It may be that many countries do not even impose any *ad valorem* taxes on ships or containers — whether of domestic or foreign "registry" or ownership.

and other means of international commerce, can be accomplished by the nations which desire to do so. This Court can take judicial notice of the fact that the Congress has enacted legislation and that the federal government has entered into innumerable tax treaties and conventions with other nations for the purpose of effectuating equitable and reasonable international tax policies. Thus, this Court is not required, as insisted upon by the Appellants, et al, to adopt a hollow meaningless fiction for state taxation of instrumentalities of international commerce — which is tantamount to their complete exemption — in order for that commerce to be subject to equitable and reasonable taxation at the international level.

6. The sixth fallacy in the argument of the Appellants, et al, is the implied assumption that appropriate international policy of the United States is not required to take into consideration the legitimate revenue needs and tax policies of the fifty states. In interpreting the federal Constitution, this Court has always done so. Yet in his argument to the Court, the Solicitor General has not taken those needs into consideration or discussed the merit of *Hays* as applied to state taxation.

The Supreme Court of California in *Sea-Land Service, Inc. v. County of Alameda, supra,* was generous in its characterization when it characterized the "home port" doctrine as "anachronistic" (117 Cal. Rptr. 458) as applied to the states' taxing powers in light of modern business practices.

The home port doctrine, as we understand its evolution in this Court, is based upon the twin legal fictions of legal domicile of the owner and registration of the ship.[30] Apparently, domicile of the legal owner as used

[30]Section 17 of Chapter 2 of 46 U.S.C. provides:

"Every vessel, not enrolled or licensed, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be

therein, refers to technical legal ownership and not ownership in any substantive sense. Therefore, under the home port doctrine, major United States oil companies may form subsidiaries in "flag of convenience" nations, such as Nigeria or Panama, under the technical ownership of a subsidiary (if necessary for registration of the ship under a foreign flag) and ply ships between Alaska and Washington without incurring any tax liability to either of these states and their political subdivisions. This led the United States Congress to realize that it was necessary to reach some type of international agreement on tanker safety standards because 85 percent of the ships using United States ports were of foreign registry (See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 167 (1978), footnote 17.)[31]

Irrespective of the general merit or demerit of the home port doctrine at the national level for either taxation or general regulatory purposes, we submit that it is a totally unworkable doctrine as applied to the states in relationship to their taxing powers. The position of the

but one or if more than one, the husband or acting and managing owner of such vessel, usually resides."

Section 18 provides:

"For the purposes of the navigation laws of the United States and of sections 911, 923-927, 941, 961-964, 971-975, and 981-984 of this Title, every vessel of the United States shall have a "home port" in the United States, including Puerto Rico, which port the owner of such vessel, subject to the approval of the Commissioner of Customs, shall specifically fix and determine, and subject to such approval may from time to time change. Such home port shall be shown in the register, enrollment, and license, or license of such vessel, which documents, respectively are referred to as the vessel's document. The home port shown in the document of any vessel of the United States in force on February 16, 1925, shall be deemed to have been fixed and determined in accordance with the provisions herein. Section 17 of this title is amended to conform herewith."

[31]As noted in footnote 17 of *Ray v. Atlantic Richfield Co.*:

"The Senate report notes that eliminating foreign vessels from title 2 would be 'ineffective, and possibly self-defeating,' because approximately 85% of the vessels in the navigable waters of the United States are foreign registry."

Appellants, et al, is that state taxing power is zero if the "home port" is in a foreign country. If, however, you have a domestic flag vessel, it and the cargo containers which it uses, are subject to taxation only at "home port" in the United States.

This simply means that any major United States corporation can select any state in the United States nearest the "legal domicile" of the paper owner (see 46 U.S.C. §§ 17-18, footnote 30, *infra*) as "home port" and confer on that state exclusive taxing powers over such corporation's instrumentalities of shipping commerce (except those used exclusively in inland waters). This is true even if a state has no "port" within the substantive meaning of that term. Thus, any inland state, such as North Dakota, could tax all the ships and containers of such a corporation at full value, though the ship and containers are never physically present in the state. Under these circumstances, any "home port state" that attempted to assert taxing jurisdiction over such ships and their containers would find such taxes quickly invalidated by their own courts or find that they no longer had any thriving shipping industry attributable to them by the "home port" doctrine. In other words, the technical legal domicile of the owner of ships engaged in trade in international waters, places mere form over substance and is a completely unworkable standard for state taxation purposes.

Because of the inability of states to impose and administer their property taxes on the basis of legal fictions, particularly as applied to movable tangible personal property which may have no actual presence in the taxing jurisdiction, it is a mockery for the Appellants, et al, to premise their arguments in this case on questions of tax equity, double taxation, and threats of tax retaliation by other nations.

It is submitted that such national dilemmas, with all due respect to the Appellants, et al's praise of the home port doctrine, is attributable to the application of the home port doctrine and particularly to the subject matter of taxation.

We thus respectfully submit that when the states' interests are weighed in the balance, there is no overriding national policy which requires the home port doctrine to be extended to containers.[32] Thus, irrespective of the merits of the home port doctrine at the national level, it should not be mandated by this Court as a constitutional standard for state *ad valorem* property taxes.

7. A seventh fallacy of the argument of the Appellants, et al, is that the decision of the Supreme Court of California might trigger retaliatory taxes in other countries against United States shipping and container industries and that the imposition of such retaliatory taxes would then subject such industries to duplicate taxation in conflict with the national interest. Such argument is predicated on the proposition, the validity of which we do not here question, that all nations impose *ad valorem* property taxes on the full value of the containers under the home port doctrine.

Accepting this proposition, (which is the cornerstone of the adverse effect of possible retaliatory taxes), the

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[32]A book entitled "Flags of Convenience", an international legal study by Boleslaw Adam Boczek (Harvard University Press, Cambridge, Massachusetts, 1962) contains an interesting well-documented analysis of the international shipping problems which are an outgrowth of the home port doctrine. In discussing the advantages of flags of convenience, the author noted at p. 58:

> "A further advantage, and perhaps the greatest of all, offered by the flag-of-convenience countries to foreign shipowners, is that, besides the registration fees and annual taxes (and a few other negligible administrative dues), no other taxes are payable by shipowners in these countries. In Panama the law expressly exempts from taxation any income derived from vessels registered in Panama and engaged in international maritime commerce, even if transportation contracts are signed within Panama. Moreover, in 1941, by executive agreement, the Panamanian and the United States governments agreed to exempt the revenues of shipping companies incorporated under each other's laws from income taxation." (Footnotes omitted.)

The author further states at p. 61:

> "In the eyes of American maritime unions, the avoidance of taxation is the primary reason why American businessmen operate ships under flags of convenience, high seamen's wages being, according to the unions, only a minor reason." (Footnote omitted.)

United States based shipping and container industry would gain a substantial tax advantage over their foreign competitors, even though all the nations in which American shipping interests carried on activities imposed apportioned retaliatory *ad valorem* property taxes. This follows from the elementary proposition that a greater percentage of the value of containers which is attributed overseas by an apportionment formula such as California's, would escape taxation by the states and political subdivisions of the United States than could jurisdictionally be imposed by any retaliatory taxes of foreign nations.

For example, by applying the industry rule of thumb that such containers spend approximately one-third of each year in their home port country or other overseas locations, one-third on the seas, and one-third at some coastal or inland location in the United States (as estimated by CENSA in footnote 5 on page 8 of their brief), if all the political subdivisions in the United States in which the containers were ever present IMPOSED A TAX (even though clearly in transit), these political subdivisions could tax only one-third of the value of the containers and only one-third could be taxable by foreign nations on the basis of any apportionable presence or situs in those nations. This would relieve United States shipping interests and container interests of one-third of any overall tax liability than would be the case under the home port method (assuming comparable rates, valuations, standards, etc. for *ad valorem* property tax purposes).

There is thus no basis for the argument advanced by the Appellants, et al, that American shipping interests will be adversely affected if this Court interprets the commerce clause to permit taxation of their movable tangible property on the basis of its actual *situs* within the taxing jurisdiction irrespective of the technical legal domicile or "home port" of the owner and irrespective of how the property is characterized for purposes of commerce.

8. The eighth fallacy of the argument of the Appellants, et al, is the underlying assumption that California, in imposing an *ad valorem* property tax on Appellants, is somehow engaged in the subject matter of international relations with foreign governments which is under the exclusive control of the federal government. This is not so. California is dealing only with the subject matter of state taxation of multinational corporations that have chosen to do business within its borders. While the United States and foreign shipping interests may view with alarm any taxation of the Appellants' properties by California, their concern and interests are not the same as the interests of the federal government. While the Solicitor General argues that the *Hays* "home port" doctrine should be applied to the containers in question by this Court because it is purportedly the international practice, he has not demonstrated to this Court why this is either in the national interest or in the best interests of the American shipping and container industry for it to do so.

As heretofore indicated, the threat of retaliatory tax measures by foreign governments on U.S. shipper and container industries, could not injure such industries even if such threats became an actuality because the states would be surrendering more taxing power cumulatively in a constitutional sense than they would gain by a physical presence apportionment rule. If what is really at issue in this case, which has been candidly referred to on p. 7 of the brief of the Institute of International Container Lessors, Ltd. as a "concept of complete exclusion of ships from taxation" (which may be attributable to the international practice resulting from technical application of some form of the "home port" principle), it should be articulated and defended as a legitimate overriding national policy which requires invalidation of the California tax in question.

Also, if overriding national concern requires the defense of the *Hays* principle of taxation as contrasted to apportionment on the basis of actual situs, its merit should be defended by the federal government before it

asks this Court to incorporate it in the United States Constitution as a rule of law for the taxation of instrumentalities of foreign commerce by the states of the United States and their political subdivisions.[33]

F. The ad valorem property tax in question is not invalid under the import-export clause of the United States Constitution because it is not a tax on imports or exports, and does not conflict with the purposes of that clause.

This Court in *Michelin Tire Corp. v. Wages, supra,* 423 U.S. 276 (1976), expressly held that an *ad valorem* property tax was neither a tax on imports or exports. It further held that it was not the type of tax that interfered with the basic purposes of the import-export clause. Notwithstanding these express holdings, the Appellants, et al, argue that the tax in question is invalid within the purview of the import-export clause. The Solicitor General in footnote 23 of his brief, on pages 31-32, indicates that the tax in question violates this constitutional provision, because it "could disrupt the foreign relations of the United States; and "it frustrates the ability of the national government to conduct trade with foreign nations." Further he there urges that "the state tax intrudes in an area where the United States 'must speak with one voice.' ".

For reasons heretofore indicated in this brief, this argument lacks substance. It does illustrate the sweeping federal power claims of the Solicitor General of the United States. This is of primary concern to the Commission and the amici curiae states which have joined in this brief (which undoubtedly reflects the concerns of all the fifty states).

[33]From the states' point of view, it lacks substance because it is unworkable at the state level and apparently has resulted in little or no state taxation of cargo containers. Furthermore, if the states were capable administratively of taxing cargo containers involved in international trade at the domicile of the technical legal owner or the "home port" nearest that domicile, it would completely divorce tax benefits from tax consequences and should be invalidated by this Court by reference to the benefits principle which has been extensively argued by the Appellants in their brief. As indicated by this Court in *Southern Pacific Co. v. Commonwealth of Kentucky,* 222 U.S. 63 (1911), taxation of ships at their "home port" has little relationship to the tax benefits principle. In *Southern Pacific,* this Court rightly noted: "The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the general standard sought to be attained." (222 U.S. 76 (1911)). It further noted that the "home port" state there involved had conferred substantial benefits on the corporate owner that maintained both its legal and commercial domicile in the state, even though the ships were never in the state. However, the application of the benefit principle becomes quite tenuous when the legal owner may be a shell subsidiary of a large international oil company. In this connection, it seems incongruous to us that the Appellants advance the benefit principle to urge this Court to adopt the situs concept of *Hays* for *ad valorem* property taxation of their containers, which is much more tenuously related to taxpayer benefits than the apportionment principle applied by California to Appellants in the instant case.

CONCLUSION

For the reasons stated herein, the Amicus Multistate Tax Commission and the amici curiae states respectfully urge this Court to either dismiss this appeal for lack of a properly presented substantial federal question or alternatively, to affirm the decision of the Court below.

Respectfully submitted,

WILLIAM D. DEXTER
Bank of Olympia Building
Olympia, Washington 98501
(206) 943-8320

Attorney for Amici Curiae